SUPREME COURT OF THE UNITED STATES.

No. 339.

JAMES C. SAVERY, APPELLANT,

vs.

MATILDA J. SYPHER, ADMINISTRATRIX, AND SAMUEL Y. KEENE, DECEASED.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

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a Proceedings before the circuit court of the United States in and for the district of Iowa, at a term thereof, begun and holden at Des Moines on the third Tuesday of October, A. D. 1865, it being the 17th day of the said October.

1 Be it remembered that on the 29th day of January, A. D. 1862, there was filed in the office of the clerk of the district court of the United States for the district of Iowa, western division, a bill in equity, in the words and figures following, viz:

Bill for foreclosure of mortgage.

In the U. S. dist. court for the district of Iowa, at Des Moines.

MATILDA KEENE, adm'x of the estate of Samuel Y. Keene, deceased,
vs.
JAMES C. SAVERY, ANNIE SAVERY, WILLIAM Halloran, William M. Patchen, defendants.
} Bill in eq.

UNITED STATES OF AMERICA, *District of Iowa:*

To the Hon. James M. Love, judge of the district court of the United States for the district of Iowa:

Matilda Keene, administratrix of the estate of Samuel Y. Keene, deceased, herself a citizen and resident of the town of Warsaw, county of and State of Kentucky, brings this her bill against James C. Savery, Annie Savery, William Halloran, and William M. Patchen, all of the city of Des Moines, in the county of Polk, in the State of Iowa, and citizens of said State of Iowa.

And thereupon your oratrix complains and says that heretofore, to wit, on the 11th day of June, A. D. 1856, the said defendant

2 James C. Savery, made, executed, and delivered to the said Samuel Y. Keene, his certain promissory note, dated of that date, whereby the said defendant, James C. Savery, promised to pay to the said Samuel Y. Keene or order, two years from the date thereof, the sum of eighteen hundred dollars; and that afterward, to wit, on the nineteenth day of August, A. D. 1857, the said defendant James C. Savery, made, executed, and delivered to the said Samuel Y. Keene his certain other promissory note, dated of that date, whereby the said defendant James C. Savery, promised to pay to the order of the said Samuel Y. Keene, on or before the first day of February next thereafter, the sum of forty-seven hundred dollars in current funds, as by the two said several notes, ready to be produced by your oratrix as this court shall direct, will more fully appear. And your oratrix shows that she makes copies of the said several notes as "Exhibit A" and "Exhibit B" hereto attached.

And the said defendants, James C. Savery and Annie Savery his wife, to secure the payment of the sums mentioned in the two several promissory notes, did, on the twenty-fourth day of August, A. D. 1857, execute, under their hands and seals, and deliver to the said Samuel Y. Keene their certain indenture of mortgage, dated of that date, conditioned for the payment of the sums mentioned in the said two several promissory notes, according to the tenor of said notes,

whereby the said mortgagors conveyed and mortgaged unto
3 the said Samuel Y. Keene, in fee, the following described premises, situated in the county of Polk and State of Iowa, to wit, lots No. five and six, (5 and 6,) in block twenty-three, (23;) lots No. one, two, five, and six, (1, 2, 5, and 6,) in block thirty, (30;) fractional lots one, two, five, six, and seven, (1, 2, 5, 7,) in block thirty-one, (31;) one, two, and seven, (1, 2, 7,) in block thirty-two, (32,) and one, two, six, seven, eight, and nine, (1, 2, 6, 7, 8, 9,) in block thirty-three, (33,) situated in Keene and Poindexter's addition to Des Moines; also the undivided one-half of forty acres lying adjoining south of said lots, the other half of which is owned by Poindexter, designated on the map of Bausman as Keene and Poindexter's add'n, and which conveyance was to be void only upon the payment of the said sums of eighteen hundred dollars and forty-seven hundred dollars as by the said two notes witnessed; and the said mortgage was duly acknowledged on the twenty-seventh day of August thereafter, and on the thirty-first day of August, A. D. 1857, was recorded in the office of the recorder of deeds in and for said Polk county, Iowa, in the proper books provided in said office by authority of law for that purpose, as by the said mortgage and the certificate of acknowledgment, and the recording aforesaid endorsed thereon, and ready to be produced as this court shall direct, will more fully appear; and your oratrix attaches and shows a copy of said mortgage, with said certificates as "Exhibit C" hereof. And your oratrix states that
4 the whole amount of the sums specified in the said two several notes remains due and unpaid, (except $100 paid on Feb'y 23, 1860,) and amounts to $8,000.

And your oratrix further states that the said Samuel Y. Keene died intestate in the county of Ohio and State of Indiana, on the fifteenth day of December, A. D. 1857, and that on eighteenth day of February, A. D. 1860, letters of administration of the estate of the said Samuel Y. Keene were granted to your oratrix by the county court of Polk county, Iowa, as by said letters, ready to be produced as this court shall direct, will more fully appear, and your oratrix attaches and shows a copy of said letters of administration as "Exhibit D" hereof.

And your oratrix believes and states that the said defendants, William Hollan and William M. Patchen, claim an interest in some portion of said premises by purchase subsequent to the execution, delivery, and recording of said mortgage, and that the said defendants, James C. Savery and Annie Savery, have conveyed by deed of warranty to William Hullan lot number one (1) in block number thirty (30), and to said William M. Patchen the east $\frac{2}{3}$ of lot number six (6), in block number twenty-three (23), all in Keene and Poindexter's addition to the city of Des Moines, and that said defendants Hollan and Patchen bought said several lots, with notice of the mortgage now sought to be foreclosed.

Your oratrix therefore asks the aid of this court in the prem-
5 ises and that the abovenamed James C. Savery, Annie Savery, William Hollan, and William M. Patchen, the defend-

ants in this suit, may appear before your honor in the court of chancery, and answer this your oratrix's bill according to the rules and practice of the said court, without oath, their answer or oath being hereby waived; and that the usual decree may be made for the sale of the mortgaged premises aforesaid, and for the payment of the amount due to your oratrix as administratrix aforesaid, for principal and interest upon the said notes, being six thousand five hundred dollars, with six per cent. annual interest upon four thousand and seven hundred dollars thereof since the first day of February, A. D. 1858, and interest at the same rate upon eighteen hundred dollars thereof since the eleventh day of June, A. D. 1858, except the sum of one hundred dollars interest paid, in all eight thousand dollars, ($8,000,) and the costs of this suit; and that the said defendants, and all persons claiming under them subsequent to the commencement of this suit, and all other persons although not parties to this suit who have any liens by judgment or decree upon the same mortgaged premises subsequent to the said mortgage to Samuel Y. Keene, or any liens or claims thereon by or under any such subsequent judgment or decree, either as purchasers, incumbrancers, or otherwise, may be barred and foreclosed of all equity of redemption in the said premises, and that your oratrix may have such other or such further relief as the nature of the case may require, and as to this court may seem proper and agreeable to equity.

Wherefore may it please your honor to grant unto your oratrix the writ of subpœna issuing out of and under the seal of this honorable court to be directed to the said James B. Savery, Annie Savery, William Hollan, and William M. Patchen, commanding them, by a certain day and under a certain penalty therein to be inserted, to be and appear in our said court of chancery, in Des Moines, in said district, and then and there to answer the premises, and further to stand to and abide such orders and decrees therein as shall be agreeable to equity and good conscience.

And your oratrix shall ever pray.

S. V. WHITE,
Solicitor, and of Counsel for Complainant.

Exhibit A.

$1,800.—Two years after date I promise to pay to Samuel Y. Keene or order eighteen hundred dollars, value received.

J. C. SAVERY.

Fort Des Moines, June 11, 1856.

Exhibit B.

$4,700.—On or before the first of February next, for value received, I promise to pay to the order of Samuel Y. Keene, four thousand and seven hundred dollars in current funds.

J. C. SAVERY.

Des Moines, Aug. 19, 1857.

Attest: C. E. TREADWELL.

7 *Exhibit C.*

Know all men by these presents, that I, J. C. Savery and Annie Savery, Polk county, State of Iowa, in consideration of the sum of six thousand and five hundred dollars in hand paid by Samuel Y. Keene, of Polk county, State of Iowa, do hereby sell and convey unto the said Samuel Y. Keene the following described premises, situated in the county of Polk, to wit: lots No. five and six (5, 6) in block twenty-three (23); lots No. one, two, five, and six (1, 2, 5, 6) in block thirty (30); fractional lots one, two, five, six, and seven in block thirty-one (31); one, two, and seven in block thirty-two (32), and one, two, six, seven, eight, and nine (1, 2, 6, 7, 8, 9) in block thirty-three, situated in Keene and Poindexter's addition to Des Moines; also the undivided one half of forty acres lying adjoining south of said lots, the other half of which is owned by Poindexter, designated on the map of Bausman as Keene and Poindexter's add'n.

And the said Annie Savery hereby relinquishes her right of dowry in and to the same.

Nevertheless to be void on condition that the said J. C. Savery or his assigns shall pay the full amount of principal, without interest, of two promissory notes, one for forty-seven hundred dollars, falling due on the first of February, 1858, and one of eighteen hundred dollars, due June 11th, 1858, and signed J. C. Savery.

In witness whereof, we have hereunto set our hands and
8 seal this twenty-fourth day of August, A. D. 1857.

J. C. SAVERY. [SEAL.]
ANNIE SAVERY. [SEAL.]

Acknowledgment.

STATE OF IOWA, *Polk county:*

I do hereby certify that before me, W. H. McHenry, notary public in and for said county, personally appeared the abovenamed J. C. and Annie Savery, who are personally known to me to be the identical persons whose names are affixed to the above conveyance as grantors, and acknowledged the execution of the same to be their voluntary act and deed for the purposes therein mentioned.

Given under my hand and seal this 27th day of August, A. D. 1857.

[L. S.] W. H. McHENRY, *Notary Public.*

Received for record the 31st day of August., A. D. 1857, at 5 o'clock p. m., and recorded in record book C, page 145 and '6.

SAMUEL M. DYER,
County Recorder, Polk County, Iowa.

9 *Exhibit D.—Letter of administration.*

STATE OF IOWA, *Polk county:*

I, J. H. McClelland, county judge in and for Polk county, in the State of Iowa, do hereby certify that administration of the goods, chattels, rights, credits, moneys, and effects which were of Samuel Y. Keene, late of Polk county, deceased, who died intestate, is

granted to Matilda Keene, and the said Matilda Keene having qualified and given bond as such administrator, is duly authorized to take upon herself the administration of such estate according to law.

Witness my hand and the seal of the said Polk county this 18th day of February, 1860.

[L. S.] J. H. McCLELLAND, *County Judge.*

10 And on the same 29th day of January, A. D. 1862, there was issued a subpœna in chancery, in the words and figures following, to wit:

Subpœna in chancery.

UNITED STATES OF AMERICA, *District of Iowa, Western division, ss:*

United States of America to James C. Savery, Annie Savery, William Hollan, and William M. Patchen:

We command you, and each of you, that you appear before honorable James M. Love, the judge of the district court of the United States for the district of Iowa, at Des Moines, in the western division of said district, on the first Monday of March next, A. D. 1862, to answer the bill of complaint of Matilda Keene, administratrix of the estate of Samuel Y. Keene, deceased, this day filed in the clerk's office of said court, at Des Moines, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the district of Iowa.

Witness the Hon. J. M. Love, judge of said court, at Des Moines, this 29th day of January, A. D. 1862, and of the independence the eighty-sixth year.

J. C. BURNS, *Clerk,*
By GEO. C. TICHENOR, *Deputy Clerk.*

11 Momorandum.—The within-named defendants are notified that unless they enter their appearance in the clerk's office of said court, at Des Moines aforesaid, on or before the day to which the above writ is returnable, as above stated, the complaint will be taken against them as confessed, and a decree entered thereon accordingly.

J. C. BURNS, *Clerk,*
By GEO. C. TICHENOR, *Deputy Clerk.*

Return.

This subpœna in chancery came into my hands on the 29th day of January, 1862, and on the 5th day of February, 1862, I served the same on the within-named William M. Patchen, by delivering to him a true copy of the same, and on the same day I served the same on the within-named J. C. Savery and Annie Savery, by delivering to said J. C. Savery a true copy of the same for himself, and a true copy for said Annie Savery, said Annie Savery not being found in my bailiwick; and on the 8th day of February I served the same on the with-

in-named William Hollan, by delivering to him a true copy of the same. All of the above def'ts served in the city of Des Moines, Polk county, State and district of Iowa.

H. M. HOXIE, *U. S. Marshal.*

Marshal's fees:	Service	$8 00
	Mileage	0 24
	Copy	1 00
		$9 24

12 *Motion for default.*

And on the same day, to wit, on the 3d day of March, A. D. 1862, there was filed a motion for default in the words and figures following, to wit:

United States district court, district of Iowa, March, 1862, on rule day.

MATILDA KEENE, adm'r of the estate of S. Y. Keene,
vs.
JAMES SAVERY, ANNIE SAVERY, WILLIAM Patchen, and William Hallen.

The pl'ff, by her solicitor, now moves the court for default against all the def'ts, and for an order that defendants shall not further have time to answer. Because—

1st. Defendants have not entered their appearance, although due service of subpœna was made more than 20 days prior to this rule day.

S. V. WHITE, *Sol., and of Counsel for Pl'ff.*

And the following entry was thereupon made by the clerk of the said district court in the rule book of the said court: "Whereupon, having been in attendance during the entire day at the court, and the defendants having wholly failed to cause their appearance to be entered hitherto, (8 o'clock p. m.,) although due and legal service was made upon each of them more than twenty days before the day to which said subpœna was by law made returnable, it is ordered that they be held in default, and that such other and further proceedings be had in this cause as will conform to and be in accordance with the rules of court in practice in equity causes.

"JOHN C. BURNS, *Clerk,*
"By GEORGE C. TICHENOR, *Dep'ty.*
"S. V. WHITE, *of Counsel for Pl'ff.*"

13 *Motion to take bill as confessed.*

And afterwards, to wit, on the 7th day of April, A. D. 1862, there was filed a motion for order to take bill p'r confess'd, in the words and figures following, to wit:

In the district court of the United States for the district of Iowa.

MATILDA KEENE, adm'r of the estate of Samuel Y. Keene, deceased, plaintiff,
vs.
JAMES C. SAVERY, ANNIE SAVERY, WILLIAM Hollan, and William M. Patchen, defendants.

The plaintiff, by S. V. White, her solicitor, now comes and moves the court to enter an order that the bill of plaintiff in this cause may be taken for confessed.

S. V. WHITE, *Sol., and of Counsel for Pl'ff.*

Whereupon the clerk of the said district court made the following order and entry in the rule book of the said court, viz: "Whereupon it is ordered that the said bill be so taken for confessed.

"JOHN C. BURNS, *Clerk,*
"By GEO. C. TICHENOR, *Dep'ty.*
"S. V. WHITE,
Solicitor, and of Counsel for Pl'ffs."

And afterward, to wit, on the 11th day of November, A. D. 1862, it being then of the November term, 1862, of the circuit court of the United States for the said district of Iowa, (to which court the said cause had been transferred by operation of the statute in that case made and provided,) the following motion and affidavits to set aside the foregoing default were filed in this cause, to wit:

14 *Motion to set aside default.*

In the circuit court of the United States for said district.—Motion to set aside def' lt.

MATILDA KEENE, adm'x of the estate of Sam'l Y. Keene, deceased, complainants,
vs.
JAMES C. SAVERY, ANNIE SAVERY, William Hollan, and Wm. M. Patchen, defendants.

UNITED STATES OF AMERICA, *District of Iowa:*

The deft's, James C. Savery, Annie Savery, William Hollan, and William M. Patchen, move the court to set aside the default entered against them in this cause of the 3d day of March, 1862, and also the order to take the bill of complainant pro confesso, and for cause of such motion submits the annexed affidavits of James C. Savery, Wm. M. Patchen, Wm. Hollan, and F. C. D. McKay.

C. C. COLE, *Sol., and of Counsel for Def'ts.*

And after hearing the said motion, with the affidavits therewith submitted, it was ordered by the said circuit court that the said default be set aside, and that the defendants be allowed to answer herein.

15 *Affidavit of Patchen.*

UNITED STATES OF AMERICA, *District of Iowa, Polk county, ss:*

I, William M. Patchen, being first duly sworn, do state on oath that I am one of the defendants in the foregoing entitled cause; that about the time the process in this case was served on me, and, I think, very shortly after, I went to see the solicitor and counsel for the plaintiff, S. V. White, esq., to inquire the object of the suit and what I was to do or what concern I could have with it, and he replied that I had nothing to do with the suit really, that it was Mr. Savery's matter and his affair to defend; that I afterwards, and before the 1st of March, 1862, advised Mr. Savery of the service of process upon me, and he said he would attend to it; that I bought the part of lot claimed and owned by me of James C. Savery; that I did not fail to enter my appearance out of any contempt to the process of this court, nor for the purpose of delay of this cause, but did not enter my appearance or defend the case because of the conversations and representations hereinbefore set forth; that I am informed by counsel and also by Mr. Savery that I have a good defence to the case, and I believe such to be the fact; that the matters connected with the defence are not known to me personally.

W. M. PATCHEN.

Signed and sworn to before me this 6th day of Nov., 1862, by W. M. Patchen.

W. G. WOODWARD,
Clerk of Circuit Court U. S.

16 *Affidavit of Halloran.*

UNITED STATES OF AMERICA, *District of Iowa, Polk county, ss:*

I, William Hollaran, being first duly sworn, do state on oath that I claim and occupy one of the lots mentioned in the mortgage sought to be foreclosed in this action; that my name is not William Hollan but is William Hollaran; that I purchased my lot of James C. Savery, and have occupied the same for several years; that there was a copy of the subpœna or process in this case given to me by the United States marshal, but it did not contain my name anwhere in it or any notice for me to appear or answer; that I did not fail to enter my appearance in this cause out of any contempt to the process of this court, nor for the purpose of delay in the case; that I was not named in the case and had no right, as I thought, to appear therein; that if the complainant intended to make me a party to the suit, and had so informed me, I would have entered my appearance and defend the case or caused it to be done; that I am informed by counsel, who has heard a statement of the facts connected with the defence, that I have a good and sufficient defence to this suit, and I so believe; that all the facts of the defence are not known to me personally, but have

been stated to the counsel aforesaid by my grantor, James C. Savery, who professes to know them; that the mistake in my name made by the complainant has misled me, and the complainant has obtained a default to be entered thereby.

WILLIAM HOLLARAN.

17 Signed and sworn to, by William Hollaran, before me this 8th day of Nov., 1862.

W. G. WOODWARD,
Clerk Circuit Court U. S., District of Iowa.

Affidavit of McKay.

UNITED STATES OF AMERICA, *District of Iowa, Polk county, ss:*

I, F. C. D. McKay, being duly sworn, do depose and state on oath that at some time last spring I was present on one or two occasions when conversation was had by and between S. V. White, esq., and James C. Savery, esq., in relation to an action just commenced, as I understood it, by or on behalf of one Widow Keene against said Savery, (and I believe other defendants,) for the foreclosure of a mortgage in the United States court. I recollect that one of said conversations was at said White's office in Des Moines. I cannot state where the other was, but I think I was present at two such conversations. I cannot relate either conversation so as to give the words of either party; my recollection is indistinct on the subject. Since such conversations I have had the impression that said Savery would not have to attend to the said action until November (then) next. I think I got that impression from that conversation, but how, or from what words of either party, I cannot now call to mind. I think said Savery has had the same impression during the summer past, for the
18 reason that he has once or twice said to that in November he had got this matter to see to, and his remarks served to recall to my mind the impression I think I got at one or both of said conversations.

F. C. D. McKAY.

The foregoing affidavit was subscribed and sworn to before me, by F. C. D. McKay, this Nov. 7, 1862.

W. G. WOODWARD,
Clerk of Circuit Court U. S., District of Iowa.

Affidavit of Savery.

UNITED STATES OF AMERICA, *District of Iowa, Polk county, ss:*

I, James C. Savery, being first duly sworn, do state on oath that I am one of the defendants in the foregoing entitled cause; that the defendant, Annie Savery, is my wife; that I do not know and never heard of any person by the name of William Hollan, so far as I now recollect; but I did sell one of the lots mentioned in the mortgage to one William Hollaran, who still occupies the same; and I also sold a part of one of the said lots to the defendant William M. Patchen; that at the time of the service of the process in this case upon me, it

was my purpose and intention, and has ever since been my fixed purpose and intention, to defend the same; that I have fully stated my defence to a counsellor of this court retained by me, and am informed by him, and I do verily believe, that I have a good and sufficient defence thereto both for myself and my co-defendants; that I
19 did not fail to enter my appearance in this case out of any contempt to the process of this honorable court, nor for the purpose of delay of this cause, nor with any intention to make default in the case or to waive my defence thereto. And I do further state from my best recollection that I was absent from my home, which is and was at Des Moines, on the rule day to which the subpœna was returnable, on important business that it was impracticable for me to neglect, and my attorney was absent for several days prior to said rule day and at the time of my departure from home as aforesaid, which rendered it impracticable to inform him, so as to enter my appearance for me. And I further state that the solicitor and counsel for the complainant in this case, S. V. White, esq., had, prior and up to the time and even after the commencement of this suit, been my attorney in several cases and my counsel in many matters, and after the service of said process, and before I left home as aforesaid, I met the complainant's said counsel, S. V. White, esq., who was and had been my attorney as aforesaid, and asked, in substance, when I had to answer to the case of Mrs. Keene against me and others in the United States court, and his reply to me was, in substance, "On the second Tuesday in November;" that the reply so made to me created the impression on my mind that it was not necessary for me to do anything in the case until said second Tuesday in November, and I confidently believed that such was the case until after my return and the return of
20 my attorney and counsel in this case, and until long after the rule day aforesaid; that I was misled as to the time for entering my appearance and making my defence in this case by the statements of the complainant's counsel as aforesaid, to whom I stated at the same time he so misled me that I have a good defence to this action, and was going to defend the same, and also stated some of the facts relating to my defence.

J. C. SAVERY.

Signed and sworn to before me this 7th Nov., 1862.

W. G. WOODWARD,
Clerk Circuit Court U. S., District of Iowa.

21 *Affidavit of Cole.*

And afterwards, to wit, on the 15th day of November, A. D. 1862, there was filed the affidavit of C. C. Cole as to merits, in the words and figures following, to wit:

UNITED STATES OF AMERICA, *State of Iowa, Polk county, ss:*

I, C. C. Cole, do state on oath that I am counsel for the def't, James C. Savery, in this cause; that the said defendant is now absent from Iowa and cannot make affidavit in person; that I have no per-

sonal knowledge of the facts connected with the defence, but am conversant with the matters of defence as stated to me by my client, the said J. C. Savery, and otherwise; that the substance of the defence, so far as said James C. Savery and wife are concerned, is that the conveyance of the real estate embraced in the mortgage was made by the said Samuel Y. Keene and wife to said Savery without any consideration being paid therefor, and the notes and mortgage sued on were also executed without any consideration, and the entire transaction was had at the instance and urgent request of said Keene, for the purpose of fraudulently keeping said real estate from the creditors of the firm of Newton & Keene, of which firm said Keene was a member; that said firm was in failing circumstances at the time, and actually made an assignment for the benefit of creditors about that date; that the purpose of taking negotiable notes and mortgage was in order to transfer them to a brother of said Keene, who would take the property in payment of said notes and mortgage, and then
22 hold it for the benefit of Keene and family, and others, keep it from the creditors of said Keene, and hinder them in collecting their claims; that said def't, Savery, offers to re-convey the property in the case, and disclaims and has disclaimed holding the property for himself at any time since the making of said conveyance by Keene and wife to him.

And as to the def'ts, Wm. Hollaran and Wm. M. Patchen, the substance of their defence is that the conveyance of the respective lots to them by the def't, James C. Savery, was made by the consent of the said Samuel Y. Keene, who agreed, for a valuable consideration paid and settled with him by Savery, that said Savery might convey the same, and that he would perfect the title of record before he left Des Moines by releasing the mortgage on the record as to said lots.

C. C. COLE.

Subscribed and sworn to before me by C. C. Cole this 15th day of Nov'r, 1862.

W. G. WOODWARD, *Clerk, &c.*

22*a* And afterwards, to wit, on the 15th day of November, A. D. 1862, there was filed the affidavit of S. V. White, in the words and figures following, to wit:

Circuit court of the United States.

MATILDA KEENE, ad'm of the estate of Samuel Y. Keene, plaintiff,
vs.
JAMES C. SAVERY, ANNIE SAVERY, WM. M. Patchen, and Wm. Holloran, defendants.

UNITED STATES OF AMERICA, *District of Iowa:*

I, Stephen V. White, do state on oath that I am, and have been from the commencement, sole counsel and solicitor for the plaintiff in the above cause; that I know Wm. M. Patchen, and knew him at the

commencement of this suit; that shortly after the commencement of the suit Wm. M. Patchen came to my office to see me about the suit; that I then informed him that I was retained for the plaintiff, and that it was utterly inconsistent with my duty to my client for me to talk with him about his rights in the premises, and that if he wanted advice he must go to some one else. He stated to me that Savery had got to make him whole, and wanted to know his remedies against him. I declined discussing the questions in the cause with him. He had then known of my having the mortgage in hands for two years then last past for collection, and had often talked with me
22*b* about Savery, and wanted to know his rights as against him, which I had, as I now remember, stated to him before I had received a general retainer from Mr. Savery; after which time I refused to give any opinion or to discuss his rights with him, and I swear positively that I did not tell him that he had nothing to do with this suit really. I might have said to him that Mr. Savery ought to pay the expenses of defending it, though of this I now have no remembrance.

Further, I state on oath that I neither know Wm. Hollan nor William Halloran, but made a party defendant whose name I found on the records as purchaser of portion of the lands sought to be foreclosed against.

Further, I state that at the request of the plaintiff, in the year 1860, I accepted a retainer for her in the management of this cause; that after that time, and after a partial adjustment of the matter with the defendant, Savery, I received from him a general retainer in his business, but I on my part excepted this cause, and notified him that I was under obligation to the plaintiff to prosecute the claim if she desired me so to do, to which he replied "of course I was," or words of that import; that about the time of the commencement of this suit plaintiff and said Savery had an interview, as I learned from each of them, which resulted in a failure to adjust the claim, and I was ordered to commence the suit. That after that time the said Savery repeatedly commenced conversations with me on the subject,
22*c* when I always avoided a discussion of the cause on its merits, and always ended the conversations with as few words as possible on my part. That I remember distinctly that a conversation was had between myself and said Savery, in the presence of F. C. D. McKay, and that in said conversation Savery told said McKay, who is a lawyer, that he wanted him to attend to it as his attorney in the cause, and that said conversation was before default was entered, and in time to have made an issue if the parties had attended to it. I state further that whatever impressions Mr. McKay may have carried away with him as to the time when Mr. Savery would be required to answer, he did not get those impressions from me, nor from anything I may have said.

And further, I state positively that the statement that Mr. Savery ever asked me when he had to answer herein, to which I replied in substance on the "second Tuesday in November," is utterly false; or that I ever did any act or said any word which tended, directly or in-

directly, to mislead any one of the defendants, or their counsel, is equally untrue. That I am able to state positively upon this matter from the fact that from the manner of said Savery and McKay I believed that they were unfamiliar with the rules of court governing pleading in said cause, and I deemed it alike my duty to my client not to counsel them into a course which might prolong the litigation on the one hand, and on the other my duty to them not to say or
22*d* do anything that might either mislead or tend to mislead them. That it may be true that Mr. Savery asked me when the next term of court would be held, and, if so, I told him in November. That since Mr. Cole has been retained in the cause Mr. Savery has talked to me about the default, and asked me to set it aside, which I refused, because it would be untrue to my client so to do without an order of court, and Mr. Savery has in these conversations told me that he did not read the subpœna, or he should have attended to it at the proper time, and he never in any one of said conversations has pretended that he was misled by me.

S. V. WHITE.

Sworn to, by S. V. White, before me this 15th Nov'r, 1862.

W. G. WOODWARD, *Clerk, &c.*

23 *Answer of Savery and wife.*

And afterwards, to wit, on the first day of December, A. D. 1862, there was filed the answer of J. C. Savery and wife, in the words and figures following, to wit:

In United States circuit court for said district.

MATILDA KEENE, adm'x of the estate of Sam'l Y. Keene, dec'd, complainant, *vs.* JAMES C. SAVERY, ANNIE SAVERY, WILLIAM Hollan, and Wm. M. Patchen, defendants. } Answer of J. C. Savery and wife.

UNITED STATES OF AMERICA, *Ditrict of Iowa:*

The joint and several answer of James C. Savery and Annie Savery, his wife, to bill of complaint of Matilda Keene, adm'x of the estate of Samuel Y. Keene, deceased, complainant.

These defendants, now and at all times hereafter saving and reserving to themselves all manner of benefit and advantage of exception to the many errors and insufficiencies in the complainant's said bill of complaint contained, for answer thereunto, or unto so much or such parts thereof as these defendants are advised is material for them to make answer unto, they answer and say that they admit that the defendant, Annie Savery, is wife of the defendant, James C. Savery, and state that she has no interest in the matters in controversy in this suit except such as wife, and has no personal knowledge what-

ever of the facts connected therewith, or of the statements of
24 the complainant's said bill of complaint, and she denies each and every allegation of the bill and calls for full proof thereof.

And for a further answer to the complainant's said bill of complaint, this defendant, James C. Savery, answers and says that it is true he did execute and deliver to the said Samuel Y. Keene his certain promissory note, dated the 11th day of June, 1856, whereby he promised to pay the said Keene the sum of eighteen hundred dollars two years from the date thereof, and that this defendant did make, execute, and deliver to the said Keene his certain other promissory note, dated 19th day of August, 1857, whereby he agreed to pay to the order of the said Keene, on or before the first of Feb'y then next, the sum of thirty-seven hundred dollars in current funds.

And for a further answer to the said complainant's said bill of complaint, this defendant, James C. Savery, admits that he did make, execute, and deliver to the said Keene the mortgage set out in said bill of complaint, and a copy of which is annexed to said bill; and this defendant further admits that the complainant, Matilda Keene, is the administratrix of the estate of the said Samuel Y. Keene, deceased.

And for a further answer to the complainant's said bill of complaint, this defendant admits that the defendant, William M. Patchen, does claim and own an interest in a portion of said mortgaged property, but he denies that said Patchen purchased subsequent to the execution, delivery, or recording of said mortgage, and ad-
25 mits that this defendant, James C. Savery, and Annie Savery, his wife, did convey to said Patchen the east two-thirds of lot No. six, in block No. twenty-three, but denies that said Patchen bought said lot with notice of the mortgage, either actual or constructive. And this defendant denies that William Hollan owns or claims any interest in any of said property; but this defendant admits that he, together with his wife, Annie Savery, did convey lot No. 1, in block No. thirty, to one William Hollaran, who still claims, owns, and occupies the same, and states that the said lot No. one was sold to said William Hollaran long before the execution of said mortgage, and the said William Hollaran did not buy the same with notice of the said mortgage sought to be foreclosed.

And for a further answer to the said complainant's said bill of complaint, this defendant, James C. Savery, states that on or about the day of , 185 , this defendant, together with one Andrew J. Stevens, purchased of the said Samuel Y. Keene, now deceased, the real estate described in said mortgage, a copy of which is annexed to the complainant's said bill, at the agreed price of $; that at or about the time of said purchase the said Keene made, executed, and delivered to this defendant and the said Stevens his bond for title, and at or about the same time this def't and the said Stevens paid to said Keene the sum of $2,000 in part payment of the purchase price therefor; and afterwards, to wit, on or about
26 the day of , 185 , this defendant and the said Stevens paid to said Keene the sum of $1,500 in further part

payment of the purchase price for said real estate ; that about the time of the last payment aforesaid the said Stevens sold and transferred to this def't all his interest in said bond for title ; that on the 18th day of August, 1857, the said Samuel Y. Keene agreed with this defendant that if this def't would pay him, the said Keene, the further sum of six hundred dollars he, the said Keene, would agree to and would cancel the said sale of said real estate, and would surrender all the notes for the unpaid purchase-money and take up his said bond for title, which was so agreed and done then and there; and this def't did surrender and give up the said bond for title, and did also pay, on the said 18th day of August, 1857, the sum of six hundred dollars, and the said Keene did surrender and give up to this def't the notes unpaid given for the purchase price, and the said contract of purchase and sale was then and there and thereby fully cancelled, settled, and set aside.

And this def't, for a further answer to the said complainant's said bill of complaint, answers and says that the said notes and mortgage set up by the complainant in his said bill of complaint were each and every of them executed without any good, legal, or valuable consideration whatever, either in law or equity ; and this def't says that on and about the 19th day of August, 1857, the said S. Y. Keene
27 was a partner in business with one Augustus Newton, under the firm name of Newton & Keene, doing a mercantile business in Des Moines, Iowa ; that at the date last aforesaid the said firm of Newton & Keene were in failing circumstances and unable to pay their debts, and about that time the said firm made an assignment of all their partnership effects for the benefit of their creditors ; and the said Keene, apprehending that the debts of the said firm would consume all his individual property and the real estate included in the mortgage, desired to so convey said real estate as that it could not be reached by his creditors, with the fraudulent intention of defrauding his creditors and securing said real estate to the future use of himself and family ; and thereupon the said Keene, claiming that this def't was under personal obligations to him for the cancellation of the title bond and notes as aforesaid, came to this def't and asked this def't to take a conveyance of the said real estate in fee, and to give his notes therefor and mortgage thereon, in order that the notes might be transferred to his brother and placed beyond the reach of garnishment by his creditors, and thereby save himself and family the said real estate free from his creditors' demands ; that after urgent solicitations on the part of the said Keene, this def't, with no intention to violate law, but with the determination ultimately to dispose of said real estate according to both law and equity, did consent to take said deed in fee, and to give the notes and mort-
28 gage set up in complainant's said bill ; and the more effectually to screen said transaction from legal investigation, one of the original notes, given at the time of the execution of the title bond aforesaid, was used and re-delivered to said Keene, and the said notes and mortgage were given with the express agreement and understanding that the said notes and mortgage would be transferred to

the brother of said S. Y. Keene, who would take a conveyance of said real estate from this def't in satisfaction of said notes and mortgage, and would hold the same for the benefit of the said Samuel Y. Keene and his family as aforesaid, and to be conveyed to them afterwards in such manner as circumstances might indicate; so this def't says that the said notes and mortgage were given without consideration on the part of this def't, and were caused to be so executed, and were received by the said S. Y. Keene, for the purpose and intention on the part of said Keene of cheating and defrauding his creditors, and for no other purpose or intention whatever; all of which facts are now, and were at the time, well known to the complainant.

And these defendants, James C. Savery and Annie Savery, deny each and every allegation, statement, and averment in the complainant's said bill not hereinbefore well or sufficiently answered unto, confessed or avoided, traversed or denied; all of which matters and things these defendants are ready to aver, maintain, and prove
29 as this honorable court shall direct; and humbly pray to be hence dismissed with their reasonable costs and charges in that behalf most wrongfully sustained.

JAMES C. SAVERY.
ANNIE SAVERY.

C. C. COLE, *of Counsel for said Def'ts.*

Answer of Halloran.

And on the same day, to wit, the first day of December, A. D. 1862, there was filed the answer of William Hollaran, in the words and figures following, to wit:

In the United States circuit court for the district of Iowa.

MATILDA KEENE, adm'x, &c., complainants, *vs.* JAMES C. SAVERY and others, defendants. } Separate answer of Hollaran.

The separate answer of the defendant, William Hollarin, to the bill of complaint of Matilda Keene, adm'x of the estate of Samuel Y. Keene, deceased, complainant.

This def't, now and at the times hereafter saving and reserving to himself all manner of benefit and advantage of exception to the many errors and insufficiencies in the complainant's said bill of complaint contained, for answer thereunto, or unto so much or such parts
30 thereof as this defendant is advised is material for him to make answer unto, he answers and says, that he has no knowledge, information, or belief as to whether or not on the 11th day of June, 1856, his co-def't, James C. Savery, made, executed, or delivered to the said Samuel Y. Keene his certain promissory note dated of that date, whereby the said James C. Savery promised to pay to the said Samuel Y. Keene, or order, two years from the date thereof, the sum of eighteen hundred dollars; and this def't denies said allegations and each and every of them, and calls for and demands of the

complainant full proof thereof. Nor has this defendant any knowledge, information, or belief as to whether or not the said James C. Savery, his co-def't, afterwards, to wit, on the nineteenth day of August, 1857, made, executed, and delivered to the said Samuel Y. Keene his certain other promissory note, dated of that date, whereby the def't. James C. Savery, promised to pay to the order of the said Samuel Y. Keene, on or before the first of February next thereafter, the sum of forty-seven hundred dollars in current funds; and this def't denies said allegations, and each and every of them, and calls for and demands of the complainant full proof thereof.

And, for a further answer to the complainant's said bill of complaint, this defendant denies that his co-def'ts, James C. Savery and Annie Savery, his wife, to secure the payment of the sums mentioned in the said two notes, did, on the twenty-fourth day of August,
31 1857, execute under their hands and seals, and deliver to the said Samuel Y. Keene, their certain indenture of mortgage, dated of that date, conditioned for the payment of the sums mentioned in the two several promissory notes according to their tenor, whereby his said co-def'ts conveyed and mortgaged unto the said Samuel Y. Keene, in fee, the real estate described and set out in the complainant's said bill or any part of it; and this def't denies that said conveyance was to be void only upon payment of the said sum by said two notes witnessed; this def't denies that said mortgage was duly acknowledged on the twenty-seventh day of August next thereafter, as stated by the complainant in said bill of complaint, or that on the 31st day of August, A. D. 1857, it was recorded in the office of the recorder of deeds in and for said Polk county, Iowa, in the proper books provided in said office by authority of law for that purpose; and this def't denies that the pretended copy of a mortgage attached to said complainant's bill of complaint as "Exhibit C," is a copy of any legal or valid mortgage.

And, for a further answer to the complainant's said bill of complaint, this defendant states and says that he has no knowledge, information, or belief as to whether or not the said Samuel Y. Keene died intestate in the county of Ohio, and State of Indiana, on the 15th day of December, 1857, and he therefore denies said allegations, and calls for full proof thereof; and, for further answer, this def't admits that on the 18th day of February, 1860, letters of administration were
32 granted to the complainant as stated in said bill of complaint.

And, for a further answer to the complainant's said bill of complaint, this defendant admits that he claims an interest in a portion of said premises set out in complainant's said bill of complaint, to wit, lot number one, (1,) in block number thirty, (30,) in Keene and Poindexter's addition to the city of Des Moines, but he denies that he purchased said real estate subsequent to the execution, delivery, or recording of said mortgage; and this defendant denies that he bought said real estate with notice of the mortgage now sought to be foreclosed.

And, for a further answer to the complainant's said bill of complaint, this def't states that the purchase of the said real estate, to wit, lot

the brother of said S. Y. Keene, who would take a conveyance of said real estate from this def't in satisfaction of said notes and mortgage, and would hold the same for the benefit of the said Samuel Y. Keene and his family as aforesaid, and to be conveyed to them afterwards in such manner as circumstances might indicate; so this def't says that the said notes and mortgage were given without consideration on the part of this def't, and were caused to be so executed, and were received by the said S. Y. Keene, for the purpose and intention on the part of said Keene of cheating and defrauding his creditors, and for no other purpose or intention whatever; all of which facts are now, and were at the time, well known to the complainant.

And these defendants, James C. Savery and Annie Savery, deny each and every allegation, statement, and averment in the complainant's said bill not hereinbefore well or sufficiently answered unto, confessed or avoided, traversed or denied; all of which matters and things these defendants are ready to aver, maintain, and prove
29 as this honorable court shall direct; and humbly pray to be hence dismissed with their reasonable costs and charges in that behalf most wrongfully sustained.

JAMES C. SAVERY.
ANNIE SAVERY.

C. C. COLE, *of Counsel for said Def'ts.*

Answer of Halloran.

And on the same day, to wit, the first day of December, A. D. 1862, there was filed the answer of William Hollaran, in the words and figures following, to wit:

In the United States circuit court for the district of Iowa.

MATILDA KEENE, adm'x, &c., complainants, *vs.* JAMES C. SAVERY and others, defendants. } Separate answer of Hollaran.

The separate answer of the defendant, William Hollarin, to the bill of complaint of Matilda Keene, adm'x of the estate of Samuel Y. Keene, deceased, complainant.

This def't, now and at the times hereafter saving and reserving to himself all manner of benefit and advantage of exception to the many errors and insufficiencies in the complainant's said bill of complaint contained, for answer thereunto, or unto so much or such parts
30 thereof as this defendant is advised is material for him to make answer unto, he answers and says, that he has no knowledge, information, or belief as to whether or not on the 11th day of June, 1856, his co-def't, James C. Savery, made, executed, or delivered to the said Samuel Y. Keene his certain promissory note dated of that date, whereby the said James C. Savery promised to pay to the said Samuel Y. Keene, or order, two years from the date thereof, the sum of eighteen hundred dollars; and this def't denies said allegations and each and every of them, and calls for and demands of the

complainant full proof thereof. Nor has this defendant any knowledge, information, or belief as to whether or not the said James C. Savery, his co-def't, afterwards, to wit, on the nineteenth day of August, 1857, made, executed, and delivered to the said Samuel Y. Keene his certain other promissory note, dated of that date, whereby the def't, James C. Savery, promised to pay to the order of the said Samuel Y. Keene, on or before the first of February next thereafter, the sum of forty-seven hundred dollars in current funds; and this def't denies said allegations, and each and every of them, and calls for and demands of the complainant full proof thereof.

And, for a further answer to the complainant's said bill of complaint, this defendant denies that his co-def'ts, James C. Savery and Annie Savery, his wife, to secure the payment of the sums mentioned in the said two notes, did, on the twenty-fourth day of August,
31 1857, execute under their hands and seals, and deliver to the said Samuel Y. Keene, their certain indenture of mortgage, dated of that date, conditioned for the payment of the sums mentioned in the two several promissory notes according to their tenor, whereby his said co-def'ts conveyed and mortgaged unto the said Samuel Y. Keene, in fee, the real estate described and set out in the complainant's said bill or any part of it; and this def't denies that said conveyance was to be void only upon payment of the said sum by said two notes witnessed; this def't denies that said mortgage was duly acknowledged on the twenty-seventh day of August next thereafter, as stated by the complainant in said bill of complaint, or that on the 31st day of August, A. D. 1857, it was recorded in the office of the recorder of deeds in and for said Polk county, Iowa, in the proper books provided in said office by authority of law for that purpose; and this def't denies that the pretended copy of a mortgage attached to said complainant's bill of complaint as "Exhibit C," is a copy of any legal or valid mortgage.

And, for a further answer to the complainant's said bill of complaint, this defendant states and says that he has no knowledge, information, or belief as to whether or not the said Samuel Y. Keene died intestate in the county of Ohio, and State of Indiana, on the 15th day of December, 1857, and he therefore denies said allegations, and calls for full proof thereof; and, for further answer, this def't admits that on the 18th day of February, 1860, letters of administration were
32 granted to the complainant as stated in said bill of complaint.

And, for a further answer to the complainant's said bill of complaint, this defendant admits that he claims an interest in a portion of said premises set out in complainant's said bill of complaint, to wit, lot number one, (1,) in block number thirty, (30,) in Keene and Poindexter's addition to the city of Des Moines, but he denies that he purchased said real estate subsequent to the execution, delivery, or recording of said mortgage; and this defendant denies that he bought said real estate with notice of the mortgage now sought to be foreclosed.

And, for a further answer to the complainant's said bill of complaint, this def't states that the purchase of the said real estate, to wit, lot

6, block 30, by this def't, of his co-defendant, James C. Savery, was made by this def't prior to the 31st day of August, 1857, for a full and valuable consideration, and without notice of any mortgage to or claim by the said Samuel Y. Keene to, in, or upon said lot or any part thereof; that he purchased and took possession of said lot prior to the said 31st day of August, 1857, and his purchase thereof and right thereto was well known to the said Samuel Y. Keene before he took his supposed mortgage thereon; and this def't further states that at the time of his purchase of said lot he took possession thereof and paid a part of the consideration down, and paid all the consideration prior to any notice of any mortgage to said Samuel Y.
33 Keene; and afterwards, to wit, on the day of ,
185 , he took a deed therefor from the said James C. Savery, which deed was executed in accordance with the contract of purchase made before the acknowledgment or recording of said mortgage or any part thereof to this defendant.

And this def't, for a further answer to the complainant's said bill of complaint, says and avers that after the 31st day of August, 1857, the said Samuel Y. Keene, for a full consideration paid to him by the said James C. Savery, to wit, on the first day of September, 1857, agreed to and with the said James C. Savery, that he, the said Samuel Y. Keene, would then and there and before his departure from Des Moines, release and discharge the said real estate so purchased by this def't of his co-def't, James C. Savery, as aforesaid, from all lien or incumbrance by or under said mortgage; and the said Samuel Y. Keene, for a full and valuable consideration, then and there, to wit, at the time and place aforesaid, paid to him by the said James C. Savery, did release and discharge the said lot so purchased by this def't as aforesaid from all lien and claim by virtue of said mortgage.

And, for a further answer to the complainant's said bill of complaint, this def't states that the supposed mortgage set out by the complainant in the said bill of complaint was made, executed, delivered, acknowledged, and recorded with the intention and for the purpose on the part of the said Samuel Y. Keene of cheating and de-
34 frauding his creditors, and delaying and hindering them in the collection of their said debts against him; and this def't avers that the said supposed mortgage is fraudulent and void.

And, this def't, for a further answer to the complainant's said bill of complaint, says that he is a bona fide purchaser of said lot without notice of complainant's lien, and that his title to said lot is paramount to the title set up and claimed by complainant in complainant's said bill of complaint.

And this def't, for a further answer to the said complainant's said bill of complaint, denies each and every allegation in said bill contained which is not hereinbefore denied, confessed, and avoided, or otherwise answered unto.

All which matters and things this def't is ready to aver, maintain, and prove, as this honorable court shall direct; and humbly prays to

be hence dismissed with his reasonable costs and charges in that behalf most wrongfully sustained.

WILLIAM HOLLORAN.

C. C. COLE, *Sol'r and counsel for Def't.*

35 *Answer of Patchen.*

In the United States circuit court for the district of Iowa.

MATILDA KEENE, adm'x, &c., complainant, *vs.* JAMES C. SAVERY and others, defendants. } Separate answer of Patchen.

The separate answer of the defendant, William M. Patchen, to the bill of complaint of Matilda Keene, adm'x of the estate of Samuel Y. Keene, deceased, complainant.

This def't, now and at all times hereafter saving and reserving to himself all manner of benefit and advantage of exception to the many errors and insufficiencies in the complainant's said bill of complaint contained, for answer thereunto, or unto so much or such parts thereof as this defendant is advised is material for him to make answer unto, he answers and says that he has no knowledge, information, or belief as to whether or not, on the 11th day of June 1856, his co-def't, James C. Savery, made, executed, or delivered to the said Samuel Y. Keene his certain promissory note, dated of that date, whereby the said James C. Savery promised to pay to the said Samuel Y. Keene or order, two years from the date thereof, the sum of eighteen hundred dollars, and this def't denies said allegations, and each and every of them, and calls for and demands of the complainant full proof theroof. Nor has this def't any knowledge, information, or belief as to whether or not the said James C. Savery, his co def't, afterwards, to wit, on the nineteenth day of August, 1857, made, executed, and deliv-

36 ered to the said Samuel Y. Keene his certain other promissory note, dated of that date, whereby the def't, James C. Savery, promised to pay to the order of the said Samuel Y. Keene, on or before the first of February next thereafter, the sum of forty-seven hundred dollars in current funds; and this def't denies said allegations, and each and every of them, and calls for and demands of the complainant full proof thereof.

And, for a further answer to the complainant's said bill of complaint, this defendant denies that his co-def'ts, James C. Savery and Annie Savery, his wife, to secure the payment of the sums mentioned in the said two notes, did, on the twenty-fourth day of August, A. D. 1857, execute, under their hands and seals, and deliver to the said Samuel Y. Keene, their certain indenture of mortgage, dated of that date, conditioned for *for* the payment of the sums mentioned in the two several promissory notes according to their tenor, whereby his said co-def'ts conveyed and mortgaged unto the said Samuel Y. Keene, in fee, the real estate described and set out in the complainant's said bill, or any part of it; and this def't denies that said conveyance was to be void only upon payment of the said sums by

said two notes witnessed; and this def't denies that said mortgage was duly acknowledged on the twenty-seventh day of August next thereafter, as stated by the complainant in said bill of complaint, or that on the 31st day of August, A. D. 1857, it was recorded
37 in the office of the recorder of deeds in and for said Polk county, Iowa, in the proper books provided in said office by authority of law for that purpose; and this def't denies that the pretended copy of a mortgage attached to said complainant's bill of complaint as "Exhibit C," is a copy of any legal or valid mortgage.

And, for a further answer to the complainant's said bill of complaint, this defendant states and says that he has no knowledge, information, or belief as to whether or not the said Samuel Y. Keene died intestate in the county of Ohio and State of Indiana, on the 15th day of December, 1857, and he therefore denies said allegations, and calls for full proof thereof. And, for a further answer, this def't admits that on the 18th day of February, 1860, letters of administration were granted to the complainant as stated in said bill of complaint.

And, for a further answer to the complainant's said bill of complaint, this defendant admits that he claims an interest in a portion of said premises set out in complainant's said bill of complaint, to wit, the east two-thirds of lot number six (6) in block No. twenty-three (23), in Keene and Poindexter's addition to the city of Des Moines, but he denies that he purchased said real estate subsequent to the execution, delivery, or recording of said mortgage; and this defendant denies that he bought said real estate with notice of the mortgage now sought to be foreclosed.

38 And, for a further answer to the complainant's said bill of complaint, this def't states that the purchase of the said portion of said real estate, to wit, the E. $\frac{2}{3}$ of lot 6, block 23, by this def't of his co-def't, James C. Savery, was made by this defendant prior to the 31st day of August, 1857, for a full and valuable consideration and without notice of any mortgage to or claim by the said Samuel Y. Keene to, in, or upon said lot or any part thereof; that he purchased and took possession of said lot prior to the said 31st day of August, 1857, and his purchase thereof and right thereto was well known to the said Samuel Y. Keene before he took his supposed mortgage thereon. And this def't further states that, at the time of his purchase of said lot, he took possession thereof, and paid a part of the consideration prior to any notice of any mortgage to said Samuel Y. Keene, and afterwards, to wit, on the day of , 185 , he took a deed therefor from the said James C. Savery, which deed was executed in accordance with the contract of purchase made before the acknowledgment or recording of said mortgage or any or either thereof to this defendant.

And this def't, for a further answer to the complainant's said bill of complaint, says and avers that after the 31st day of August, 1857, the said Samuel Y. Keene, for a full consideration paid to him by the said James C. Savery, to wit, on the first day of September, 1857, agreed to and with the said James C. Savery, that he, the said Samuel Y. Keene, would then and there and before his depart-

ure from Des Moines, release and discharge the said real estate so purchased by this def t of his co-def't, James C. Savery, as aforesaid, from all lien or incumbrance by or under his said mortgage; and the said Samuel Y. Keene, for a full and valuable consideration then and there, to wit, at the time and place aforesaid, paid to him by the said James C. Savery, did release and discharge the said lot so purchased by this def't as aforesaid from all lien and claim by virtue of said mortgage.

And, for a further answer to the complainant's bill of complaint, this def't states that the supposed mortgage set out by the complainant in the said bill of claimant was made, executed, delivered, acknowledged, and recorded with the intention and for the purpose, on the part of the said Samuel Y. Keene, of cheating and defrauding his creditors and delaying and hindering them in the collection of their said debts against him; and this def't avers that the supposed mortgage is fraudulant and void.

And this def't, for a further answer to the complainant's said bill of complaint, says that he is a bona fide purchaser of said lot without notice of complainant's lien, and his title to said lot is paramount to said lien, and he denies each and every allegation in said bill contained which is not hereinbefore denied, confessed, and avoided, or otherwise answered unto.

All which matters and things this def't is ready to aver, maintain, and prove, as this honorable court shall direct; and humbly
40 prays to be hence dismissed with his reasonable costs and charges in that behalf most wrongfully sustained.

WILLIAM M. PATCHEN.

C. C. COLE, *Solicitor and Counsel for Def't.*

And afterward, to wit, on the day of , was filed the following replications, to the answers of J. C. Savery and wife, W. Halloran, and W. C. Patchen.

Replication of complainant to answer of Savery.

UNITED STATES OF AMERICA, *District of Iowa:*

In United States circuit court for said district.

MATILDA KEENE, adm'x of the estate of Sam'l Y. Keene, dec'd, complainant, *vs.* JAMES C. SAVERY, ANNIE SAVERY, William Hollan and Wm. M. Patchen, defendants.	Replication of Matilda Keene, adm'x, &c.

The replication of Matilda Keene, adm'x of the estate of Samuel Y. Keene, deceased, to the joint answer of J. C. Savery and Annie Savery, defendants.

This repliant, for replication to the joint answer of James C. Savery and Annie Savery, saving and reserving to herself all and al

manner of advantage of exception which may be had and
41 taken to the manifold errors, uncertainties, and insufficiencies of the answer of said defendants, for replication thereunto, saith that she doth and will aver, maintain, and prove her said bill to be true, certain, and sufficient in the law to be answered unto by the said defendants, and that the answer of the said defendants is very uncertain, evasive, and insufficient in the law to be replied to by this repliant, without that, that any other matter or thing in the said answer contained material effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, transversed or denied, is true; all which matters and things this repliant is ready to aver, maintain, and prove, as this honorable court shall direct, and humbly prays; as in and by her said bill she hath already prayed.

S. V. WHITE, *Sol'r for Pl'ff.*

42 *Replication to answer of Halloran.*

UNITED STATES OF AMERICA, *District of Iowa:*

In the United States circuit court for the said district.

MATILDA KEENE, adm'x of Samuel Y. Keene, deceased, complainant,
vs.
JAMES C. SAVERY, ANNIE SAVERY, WM. HOLLORAN, and Wm. M. Patchen, defendants.

Replication of Matilda Keene, adm'x, &c.

The replication of Matilda Keene, administratrix of the estate of Samuel Y. Keene, dec'd, to the separate answer of Wm. Holloran, defendant.

This repliant, saving and reserving to herself all and all manner of advantage of exception which may be had or taken to the manifold errors, uncertainties, and insufficiencies of the answer of the said defendant, for replication thereunto, saith that she doth and will aver, maintain, and prove her said bill to be true, certain, and sufficient in the law to be answered unto by the said defendants, and that the answer of the said defendants is very uncertain, evasive, and insufficient in the law to be replied unto by this repliant, without that, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this repliant is
ready to aver, maintain, and prove, as this honorable court
43 shall direct; and humbly prays as in and by her said bill she hath already prayed.

S. V. WHITE, *Solicitor for Pl'ff.*

Replication to answer of Patchen.

UNITED STATES OF AMERICA, *District of Iowa:*

In the U. S. circuit court for said district.

MATILDA KEENE, adm'x of the estate of Sam'l Y. Keene, dec'd, complainant,
vs.
JAMES C. SAVERY, ANNIE SAVERY, WM. HOLloran, and Wm. M. Patchen.
} Replication of Matilda Keene, adm'x, &c.

The replication of Matilda Keene, adm'x of the estate of Samuel Y. Keene, dec'd, to the separate answer of Wm. M. Patchen, defendant.

This repliant, saving and reserving to herself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the separate answer of the said defendant, for replication thereunto, saith that she doth and will aver, maintain, and prove her said bill to be true, certain, and sufficient in the law to be answered unto by the said defendant, and that the answer of the said defendant
44 is uncertain, evasive, and insufficient in the law to be replied unto by this repliant, without this, that any other matter or thing in the said answer material or effectual in law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this repliant is ready to aver, and maintain, and prove, as as this honorable court shall direct; and humbly prays as in and by her said bill she hath already prayed.

S. V. WHITE, *Solicitor for Pl't'ff.*

And afterwards, to wit, on the 21st day of May, A. D. 1863, it then being of the May term, 1863, of the said circuit court, the following decree was rendered and ordered to be entered of record, by the said court, that is to say—

45 *Decree in equity.*

MATILDA SYPHER, late Matilda Keene, admin'x on the estate of S. Y. Keene, deceased,
vs.
JAMES C. SAVERY, ANNIE SAVERY, WM. M. Patchen, and Wm. Halloran.
} No. 10, eq.

This cause being now called for hearing, the complainant appears, by S. V. White, esq., her solicitor, and the respondents by C. C. Cole, esq., their solicitor, and agree in open court that on the 12th day of May, A. D. 1863, there was due from the defendant, J. C. Savery, to the complainant, Matilda Sypher, late Matilda Keene, administratrix on the estate late of S. Y. Keene, on the notes and mort-

gage sued upon, the sum of eight thousand and four hundred and twenty dollars and ninety cents, ($8,420 90.)

Whereupon it is considered, adjudged, and decreed by the court that the complainant, Matilda Sypher, late Matilda Keene, administratrix, &c., have and receive the sum of eight thousand and four hundred and twenty dollars and ninety cents, ($8,420 90,)
46 with interest thereon from May 12th, 1863, at the rate of six per centum per annum, and the costs of this suit, taxed at $.

And it is further ordered and decreed that the said defendant, J. C. Savery, pay to the complainant, or to S. V. White, esq., or to the clerk of this court, within sixty days from this date, the abovenamed sum, with interest and costs; and in default of such payment that W. G. Woodward, esq., a master and commissioner of this court, whenever requested thereto in writing by the complainant or her solicitor, be authorized, directed, and required to sell and dispose of the real estate mortgaged, that is to say: Lots number five and six (5 and 6) in block twenty-three (23); lots number one, two, five, and six (1, 2, 5, and 6) in block thirty (30); fractional lots one, two, five, six, and seven (1, 2, 5, 6, and 7,) in block thirty-one (31); lots one, two, and seven (1, 2, and 7) in block thirty-two (32); and lots one, two, six, seven, eight, and nine (1, 2, 6, 7, 8, and 9) in block thirty-three (33), situated in Keene and Poindexter's addition to Des Moines.

47 Also the undivided one-half of forty acres lying adjoining the south side of said lots, the other half of which is owned by Poindexter, and designated on the map of Bausman as Keene and Poindexter's addition, which real estate is hereby ordered to be sold to satisfy this decree, principal and interest, and costs, which sale is hereby ordered to be made by the said master in the city of Des Moines, where this court is held; and the said master is hereby directed and required to give four weeks' notice of the time and place of such sale by publication of notice thereof in a weekly newspaper printed in the city of Des Moines, and by posting written or printed notices thereof, one at the north front door of the court-house, one at the west front door of Sherman's block, and one at the west front door of the capitol, in Des Moines, Iowa; and he shall further serve notice of such sale on the def't, J. C. Savery, at least twenty days prior to such sale. And further, it is ordered that the complainant,
48 or any of the parties to this suit, may become the purchaser at such sale. And the said master shall, upon such sale, pay, first, the cost of such sale; secondly, the costs of this suit; and thereafter the amount of the said decree and interest, or so much thereof as may be realized from the proceeds of said sale; and the excess, if any, shall be paid to the clerk of this court to be held for the use of the said defendant.

And it is further ordered and decreed that the said master shall, on the next rule day after such sale, file with the clerk of this court a report of the said sale and of all his doings in the premises, and shall deliver to the def't, J. C. Savery, or to his counsel, a copy thereof at the same time; and the said def't shall be held to file his

exceptions thereto on or *or* before the next rule day thereafter, if any exceptions he have.

And further, it is ordered and decreed that from and after such sale the equity of redemption of the defendants, J. C. Savery, Annie Savery, Wm. Halloran, and Wm. M. Patchen, and of all persons whomsoever claiming or to claim the said land by, through,
49 or under them, since the date of the said mortgage, to wit, since the 24th day of August, A. D. 1857, be, and the same is hereby, forever barred and foreclosed.

And it is further ordered and decreed that the purchaser or purchasers of the said mortgaged premises be let into possession thereof, and that any of the parties in this cause who may be in possession of said premises, or any part thereof, or any person who, since the commencement of this suit, has come into possession by or under them or any of them, deliver possession thereof to such purchaser or purchasers, on production of the master's deed for said premises, and a certified copy of the order confirming the order of such sale, after such sale has become absolute.

And afterward, now, on the 13th day of May, 1865, the following motion was filed in the said circuit court, to confirm the sale aforesaid, viz :

Motion to confirm sale and satisfy decree.

In the circuit court of the United States, district of Iowa, in eq.

MATILDA KEENE, adm'x,
v.
JAMES C. SAVERY, ANNIE SAVERY, W. M. Patchen, and W. Halloran.

Now comes the defendant, James C. Savery, and moves the court to confirm the sale of real estate hereinbefore by the master in chancery for the satisfaction of the decree hereinbefore entered, and to order that said decree be satisfied of record.

WITHROW & SMITH,
for Defendant Savery.

49*a* *Motion of Compl't to set aside sale.*

And on the same 13th day of May, 1865, there was filed a motion in the following words, viz:

MATILDA KEENE, admin'x,
v.
JAMES C. SAVERY *et al.*
No. 10, eq.

The complainant moves the court to set aside the sale of the mortgaged premises hereinbefore made in this cause and the report thereof by the master filed herein, for the following reasons:

I. The sale was made on a pretended contract between complainant and defendants that complainant had no legal power to make.

II. That by the terms of said contract the respondent was to have said property conveyed to complainant at the master's sale free and

clear of all incumbrances suffered or permitted by him, the said respondent, which he has failed and refused to do.

III. The report of the master does not show to whom said real estate described therein was sold, nor does it show to whom the same was deeded.

To sustain this motion complainant refers to the record in this cause, the affidavit of complainant filed herein, and the certificate of the treasurer of Polk county, Iowa.

POLK & HUBBELLS, *Att'ys for Compl't.*

50 *Affidavit of Comp't.*

And afterwards, to wit; on the 13th day of May, 1865, there was filed the affidavit of Matilda Keene, adm'x, &c., complainant, in the words and figures following, to wit:

In the U. S. circuit court, district of Iowa.

MATILDA KEENE, adm'x of the estate of S. Y. Keene, dec'd, comp't,
vs.
JAMES C. SAVERY *et al.*, def'ts.

I, Matilda Sypher, formerly Matilda Keene, do state on oath that I am the administratrix of the estate of Samuel Y. Keene, dec'd, and as such am complainant in this action; that on the day of , 186 , I placed the mortgage and notes set out in my bill on file in this case in the hands of S. V. White, an attorney of this court, for collection, and he instituted suit thereon; that some time after said suit was instituted, but whether before or after the decree was rendered in this case I cannot now state, my attorney came to me and informed me that the defendants were willing to arrange the matters in controversy in this suit, as follows: that the defendant, James C. Savery, was to return to affiant as administratrix aforesaid all of the property described in the mortgage in suit except said lots so sold *sold* by him to his co-defendants, Patchen and Halloran, in the same condition they were in when deeded to him by said S. Y. Keene, dec'd; that is, he was
51 to pay all taxes on the said premises and remove all liens created or permitted by him thereon; was to pay this affiant three hundred dollars, for which affiant was to release said lots so sold by said Savery to Patchen and Haloran, and the said Savery was to pay all the costs of this suit and my attorney's fee, and this affiant was to take said three hundred dollars and said property in full for said debt secured by said mortgage, to which proposition I assented and agreed, and it was then understood that the same was to be carried out by having said property sold under the decree of this court; the said Patchen and Haloran were to bid off their lots for three hundred dollars, which was to be credited on the decree in this case, and this affiant was to bid off the balance of said property for the balance due on said judgment; that at the time said agreement was made my said attorney informed me that I, as administratrix, had authority to make the same; that some time after this arrangement my attorney paid me for said Savery the said sum of three hundred dollars.

I further state that after said three hundred dollars were paid to me, and before the sale was made in this case, my attorney presented to me the paper hereto attached as Exhibit No. 1, claiming that it set out my agreement with the defendants above referred to, and requested me to sign it, which I declined to do, telling him that it did
52 not set out the agreement as we had entered into it; I also then informed him that the defendant had not paid the taxes on said premises, but had permitted the same to be sold for taxes, and that I would not consent to such an arrangement unless he returned the property to me in the same condition as to incumbrances as it was in when deeded to him by my late husband, the said Samuel Y. Keene; that a short time after this a clerk of Mr. S. V. White brought to me the paper hereto attached, marked Exhibit No. 2, and made part hereof, and said that my said attorney, S. V. White, desired me to sign it and return the same to him; this I declined to do for the same reasons that I declined signing the above statement—it did not set out the contract; that I have at all times refused to sign any such contract or agreement, and directed my attorney not to have said property sold or bid in on any such terms as are set out in said Exhibits No. 1 and 2, but he, the said S. V. White, without my knowledge, authority, or consent, procured the master commissioner of this court to execute the decree rendered in this case and bid said property in in accordance with the stipulations set out in Exhibit No. 1 and 2, which was and is in violation of my agreement with the defendant, J. C. Savery, and against my instructions to him.

I further state that, as I am informed and believe, the said
53 James C. Savery has permitted said property to become largely incumbered with taxes, and has allowed the treasurer of Polk county, Iowa, to sell the same for taxes, and that a tax title will mature thereon on the day of , 1865, unless redeemed from said sale before that time; that said mortgaged premises are worth greatly less than the amount called for by the decree in this case and the taxes due thereon.

I further state that I am willing to carry out said contract on my part, if I have the power so to do, if the said Savery will release said lands from the taxes and other incumbrances permitted thereon by him. If, however, this court shall hold that I have not the legal power to make such compromise from the fact that I have obtained no order from the county court so to do, (which I aver is true,) or for any other reason. I am willing, and hereby offer, to credit the decree in this case with said sum of three hundred dollars so paid me by the said Savery.

I further state that Exhibit No. 1 hereto is in the handwriting of S. V. White, my said attorney, and that Exhibit No. two is in the handwriting of his said clerk.

MATILDA K. SYPHER.

Subscribed and sworn to, by Matilda K. Sypher, before me this 13th day of May, 1865.

[SEAL.]

F. M. HUBBELL,
Notary Public, Polk Co., Iowa.

54 *Exhibit No.* 1.

Circuit court of the United States for the district of Iowa, May term, 1863.

MATILDA SYPHER, administrator of S. Y. Keene, dec'd,
vs.
JAMES C. SAVERY, ANNIE SAVERY, WM. M. Patchen, and William Holloran.

In the above cause it is stipulated that plaintiff shall take a decree for the amount due upon the notes and mortgage at the next term; that at the sale under the decree therein the property shall be sold for sufficient to satisfy the entire decree, principal, interest, and costs, and in consideration of the sum of three hundred dollars now paid, the receipt of which is acknowledged hereby, and of the further agreement of defendants to pay to the master selling the property all the costs of the court and sale; and, further, to pay pl'ff's attorney his entire costs, it is agreed that the defendants Holloran and Patchen shall become the purchasers of the property occupied by them as residences under purchase from said Savery, being 2 lots as follows: lot No. 1, block thirty, and lot six in block twenty-three, without competition, the amount of the bids for both pieces of property to equal the three hundred dollars so paid this day. This arrangement being made to perfect the title to said property in the said Holloran and Patchen; this stipulation not to be binding upon plaintiff unless the said
55 Savery shall pay all costs and charges as stated herein before.

S. V. WHITE, *for Pl'ff.*

May 2d, 1863.

Exhibit No. 2.—*Stipulation.*

In the circuit court of the United States for the district of Iowa, May term, 1863.

MATILDA SYPHER, administratrix of S. G. Keene, deceased,
vs.
JAMES C. SAVERY, ANNA SAVERY, WM. M. Patchen, and William Holloran.

In the above-entitled cause it is stipulated that the plaintiff shall take a decree for the amount due upon the notes and mortgage at the next term; that, at the sale under the decree therein, the property shall be sold for sufficient to satisfy the entire decree, principal, interest, and costs.

And in consideration of the sum of three hundred dollars ($300) now paid, the receipt of which is hereby acknowledged, and of the further agreement of the defendants to pay to the master selling the property all the costs of court and sale, and, further, to pay plaintiff's attorney his entire costs, it is agreed that the defendants Halloran and Patchen shall become the purchasers of the property occupied by

them as residences, being two (2) lots as follows: lot number
56 one (1) in block number thirty (30) and lot number six (6) in block number twenty-three, purchased by them from said Savery and situated in Keene and Poindexter's addition. And that they shall become such purchasers without competition, the amount of the bids for both pieces of property to equal the three hundred dollars ($300) so paid this day. This arrangement being made to perfect the title to said property in the said Halloran and Patchen.

This stipulation not to be binding upon plaintiff unless the said Savery shall pay all costs and charges as hereinbefore stated.

May 2d, 1863.

57 *Master's Report.*

And afterwards, to wit, on the 15th day of May, 1865, there was filed the master's report of sale in the words and figures following, to wit:

In the circuit court of the United States for the district of Iowa.

MATILDA J. SYPHER, late Matilda J. Keene, adm'x upon the estate of S. Y. Keene, deceased,
vs.
JAMES C. SAVERY, ANNA SAVERY, W. PATCHEN, and W. Halloran.
} Master's report of sale.

UNITED STATES OF AMERICA, *District of Iowa:*

To the judges of the circuit court of the United States for the district of Iowa:

In pursuance of and by virtue of a decretal order of this court made in the above cause on the 21st day of May, A. D. 1863, it being of the May term of the said court, by which it was among other things ordered and decreed that the mortgaged premises mentioned in the bill of complaint in this cause, namely: lots number five (5) and six (6) in block twenty-three (23); lots No. one (1), two (2), five (5), and six (6) in block thirty (30); fractional lots No. one (1), two (2), five (5), six (6), and seven in block number thirty-one (31); lots No. one (1), two (2), and seven (7) in block number thirty-two (32); lots No. one (1), two (2), six (6), seven (7), eight (8), and nine (9) in block number thirty-three (33); all in Keene and Poindexter's addition to Des Moines as the same is platted and recorded in the recorder's office; also the undivided half of forty acres lying adjoining the south side of said lots, the other half of which is owned by
58 Poindexter, and is designated on the map of Bausman & Co. as Stevens and Poindexter's addition, or so much thereof as might be necessary to satisfy the decree in the above cause, in principal, interest, and costs, be sold at public auction, by or under the direction of the undersigned, a master appointed by this court; that said sale be made in the city of Des Moines, and that the said master give four weeks' notice of the time and place of such sale by

publication thereof in a weekly newspaper printed in the city of Des Moines, and by posting written or printed notices thereof, one on the west front door of Sherman's block, one on the north door of the court-house, and one at the west front door of the capitol in Des Moines, Iowa, and by further serving notice of such sale on the def't, J. C. Savery, at least twenty days prior to such sale.

And it was further ordered that, from the proceeds of such sale, the master should pay, first, the costs of said sale; secondly, the costs of this suit; and thereafter the amount of the said decree and interest, or so much thereof as might be realized from the proceeds of such sale, and the excess, if any, to be paid to the clerk of this court to be held for the use of the said defendants.

I, W. G. Woodward, master in chancery appointed by this court, do respectfully certify and report that, having been charged by the solicitor of the complainant in writing with the execution of th
said decree, I advertised the said premises to be sold by me
59 at the west front door of Sherman's block, in the city of Des Moines, on the 3d day of October, A. D. 1863, by giving four weeks' notice of the time and place of such sale by publication thereof in the Iowa State Register, a weekly newspaper printed in the city of Des Moines, for four consecutive weeks before the day of sale, and by posting printed notices thereof, one at the west front door of Sherman's block in Des Moines city, one at the north door of the court-house, and one at the west front door of the capitol in Des Moines, and by further serving notice of the time and place of such sale on the def't, J. C. Savery, more than twenty days before the day of such sale, as will more fully appear by the proofs of such notices contained in the affidavits and acknowledgments hereto attached and made exhibits hereof.

And I hereby further report that on the said 3d day of October, 1863, I attended at the time and place of sale, and exposed the said lands to sale at public auction to the highest bidder, and the said land and lots were sold and struck off in separate parcels, as follows: lot six (6) in block twenty-three (23), in Keene and Poindexter's addition, to William M. Patchen, for the sum of one hundred and fifty dollars ($150), he being the highest and best bidder therefor; lot one (1) in block thirty (30), in the same addition, to William Halloran, for the sum of one hundred and fifty dollars ($150), he being the highest bidder therefor, and all the following lots were struck off to the complainant, viz:

Lot five (5) in block twenty-three (23); lot two (2) in block
60 thirty (30); lot five in block thirty (30); lot six in block thirty (30); fractional lot one (1) in block thirty-one; lot two in block thirty-one (31); lot five (5) in block thirty-one (31); lot six (6) in block thirty-one (31); lot seven (7) in block thirty-one (31); lot one (1) in block thirty-two (32); lot two (2) in block thirty-two (32); lot seven in block thirty-two (32); lot one in block thirty-three (33); lot two (2) in block thirty-three (33); lot six (6) in block thirty-three (33 ; lot seven (7) in block thirty-three (33); lot eight (8) in block thirty-three (33); and lot nine (9) in block thirty-three (33), all in Keene

and Poindexter's addition to the city of Des Moines; each of which was bid off by the complainant, by S. V. White, her soliciter, for the sum of one hundred and fifty dollars, amounting in all to the sum of two thousand and seven hundred dollars. And also the undivided half of forty acres of land lying adjoining the south side of the said lots, the other half of which is owned by the said Poindexter, and is designated on the map of Bausman & Co. as Keene and Poindexter's addition, was in like manner bid off by and struck off to the said complainant, by her said solicitor, for the sum of five thousand and seven hundred and eighty dollars and nine cents ($5,780 09), she being the highest and best bidder in each of said bids and sales. The said sales together amount in all to the sum of eight thousand and seven hundred and eighty dollars and nine cents ($8,780 09.)

And I have executed and delivered a deed to the said Wm.
61 M. Patchen, W. Halloran, and the deed to complainant was draughted and executed, saving the filling blank describing the character of the pl'ff as purchaser, whether as administrator or as trustee of the heirs of the estate.

And I further report that I have disposed of the proceeds of said sale in the manner following:

Retained for my comm'n	$46 76
For deed and per diem, report, and acknowledgment	8 25
For stamps for three deeds	11 00
Paid for printing notices	17 50
Paid to the clerk of the court costs of the suit, &c.	44 12
	127 63
Paid S. V. White, esq., complainant's solicitor, for the purchase of W. M. Patchen	$150 00
Purchase of W. Halloran	150 00
Paid to same for the purchase of lots and land by the said,	8,352 46
	8,652 46

Which is the amount of the debt and interest, and this decree and the costs therein are fully satisfied.

Which is respectfully submitted by

W. G. WOODWARD, *Master in Chancery.*

62 *Request to sell.*

In the circuit court of the United States, May term, 1863.

MATILDA SYPHER, admin'r of S. Y. Keene,
vs.
JAS. C. SAVERY.

To W. G. Woodward, master in chancery:

SIR: You are hereby requested to proceed to make sale of the

mortgaged premises in the abovenamed cause, in accordance with the decree therein, at as early a day as practicable, the said debt still remaining unpaid.

S. V. WHITE, *Solicitor for Comp't.*

Des Moines, August 20, 1863.

I, Stephen V. White, do make oath and say that on Sept. 4th, 1863, I posted a notice in print, of which the attached notice is a copy, at the west front door of Sherman's block, another at the west front door of the capitol, and another at the north front door of the court-house, all in Des Moines.

S. V. WHITE.

Subscribed and sworn to before me, by S. V. White, on Oct. 3d, 1863.

W. G. WOODWARD,
Clerk Circuit C't U. S., Iowa.

Master in chancery's sale.

Whereas on the 21st day of May, A. D. 1863, by the consideration of the circuit court of the United States for the district of Iowa, at a term of said court begun and holden in the city of Des Moines on the second Tuesday of May, A. D. 1863, in a certain cause then and there depending in said court wherein Matilda Sypher, late Matilda Keene, administratrix of the estate of Samuel Y. Keene, deceased, was plaintiff, and James C. Savery and others were defendants, it was, among other things, found that there was due the plaintiff from said James C. Savery the sum of eight thousand four hundred twenty $\frac{00}{100}$ dollars and interest at six per cent. from May 12th, 1863. together with costs of suit taxed at $; and whereas it was further ordered that within sixty days from that date the said James C. Savery should pay the said sum, and in default thereof the undersigned was appointed special master and commissioner in chancery to sell the real estate hereinafter mentioned and described, and was authorized, directed, and required, whenever requested by the plaintiff or his counsel, to sell said real estate in separate parcels, or so much thereof as is necessary to satisfy said sum. with interest, costs, and accruing costs, at the west front door of Sherman's block, in the city of Des Moines, first giving four weeks' notice of the time and place of said sale by publication in a weekly newspaper printed in the city of Des Moines, and by posting written or printed notices thereof, one on the west front door of Sherman's block, one at the north door of the court-house, and one at the west front door of the capitol; and whereas payment thereof hath not been made, and the undersigned hath been requested by plaintiff's counsel to sell said premises:

Now, therefore, notice is hereby given to all whom it doth or may concern that, on Saturday the third day of October, A. D. 1863, I will, at the west front door of Sherman's block, in the city of Des Moines, at the hour of eleven o'clock in the forenoon of said day, expose for sale the certain pieces or parcels of the land situate, lying, and being in the county of Polk and State of Iowa, viz:

Lots number five (5) and six (6) in block number twenty-three (23); lots number one (1), two (2), five (5), and six (6) in block thirty (30); fractional lots numbered one (1), two (2), five (5), six (6), and seven (7) in block number thirty-one (31); lots numbered one (1), two (2), and seven (7) in block number thirty-two (32); lots numbered one (1), two (2), six (6), seven (7), eight (8), and nine (9) in block thirty-three (33), all in Keene and Poindexter's addition to Des Moines, as the same is platted and recorded in the recorder's office of Polk county, Iowa; also the undivided half of forty acres lying adjoining the south side of said lots, the other half of which is owned by Poindexter, and is designated on the map of Bausman & Co. as Stevens and Poindexter's addition, or so much of said lots and lands as may be necessary to satisfy said sum, and will upon such sale execute a deed or deeds to the purchaser or purchasers according to the order in said case so made by the said court, at the time and place aforesaid, to which reference is hereby made.

WM. G. WOODWARD,
Special Master and Com'r in Chancery.

S. V. WHITE, *of Counsel for Plaintiff.*

Sept. 2—4w.

63 I, James C. Savery, do admit that due and legal service of this notice was made on me Sept. 4th, 1863.

J. C. SAVERY.

I, F. W. Palmer, printer and publisher of the Iowa State Register, a weekly newspaper printed and published at Des Moines, in Polk county, Iowa, do depose that a notice, of which the annexed is a copy, was published for four weeks consecutively preceding the 3d day of October, 1863, in the aforesaid newspaper.

F. W. PALMER.

Subscribed and sworn to, by F. W. Palmer, before me this 3d day of October, A. D. 1863.

W. G. WOODWARD,
Clerk of Circuit Court of the U. S. for Iowa.

Advertisement.—Master in chancery's sale.

Whereas on the 21st day of May, A. D. 1863, by the consideration of the circuit court of the United States for the district of Iowa, at a term of said court begun and holden in the city of Des Moines on the second Tuesday of May, A. D. 1863, in a certain cause then and there depending in said court wherein Matilda Sypher, late Matilda Keene, administratrix of the estate of Samuel Y. Keene, deceased, was plaintiff, and James C. Savery and others were defendants, it was, among other things, found that there was due the plaintiff from said James C. Savery the sum of eight thousand four hundred twenty $\frac{90}{100}$ dollars and interest at six per cent. from May 12th, 1863, together with costs of suit, taxed at $; and whereas it was further ordered that within sixty days from that date the said James C. Sav-

ery should pay the said sum, and in default thereof the undersigned was appointed special master and commissioner in chancery to sell the real estate hereinafter mentioned and described, and was authorized, directed, and required, whenever requested by the plaintiff or his counsel, to sell said real estate in separate parcels, or so much thereof as is necessary to satisfy said sum, with interest, costs, and accruing costs, at the west front door of Sherman's block in the city of Des Moines, first giving four weeks' notice of the time and place of said sale by publication in a weekly newspaper printed in the city of Des Moines, and by posting written or printed notices thereof, one on the west front door of Sherman's block, one at the north door of the court-house, and one at the west front door of the capitol; and whereas payment thereof hath not been made, and the undersigned hath been requested by plaintiff's counsel to sell said premises:

Now, therefore, notice is hereby given to all whom it doth or may concern, that on Saturday, the third day of October, A. D. 1863, I will, at the west front of Sherman's block, in the city of Des Moines, at the hour of eleven o'clock in the forenoon of said day, expose for sale the certain pieces or parcels of land situate, lying, and being in the county of Polk, and State of Iowa, viz: Lots number five (5) and six (6) in block number twenty-three (23); lots number one (1), two (2), five (5), and six (6) in block thirty (30); fractional lots numbered one (1), two (2), five (5), six (6), and seven (7) in block number thirty-one (31); lots numbered one (1), two (2), and seven (7) in block number thirty-two (32); lots numbered one (1), two (2), six (6), seven (7), eight (8), and nine (9) in block number thirty-three (33), all in Keene and Poindexter's addition to Des Moines, as the same is platted and recorded in the recorder's office of Polk county, Iowa; also the undivided half of forty acres lying adjoining the south side of said lots, the other half of which is owned by Poindexter, and is designated on the map of Bausman & Co. as Stevens and Poindexter's addition, or so much of said lots and lands as may be necessary to satisfy said sum, and will upon such sale execute a deed or deeds to the purchaser or purchasers according to the order in said case so made by the said court, at the time and place aforesaid, to which reference is hereby made.

WM. G. WOODWARD,
Special Master and Com'r in Chancery.

S. V. WHITE, *of Counsel for Plaintiff.*
Sep. 2—4w.

In circuit court of United States, May term, 1863.

MATILDA SYPHER, administrator, &c., }
vs. }
JAS. C. SAVERY, *et al.* }

The plaintiff in the above cause to F. W. Palmer, Dr.:

To four weeks' advertisement in the Iowa State Register of notice of sale in the abovenamed cause $17 50

Des Moines, Oct. 3d, 1863, received the above in full from S. V. White, esq.

F. W. PALMER.

64 *Notice to confirm sale.*

And afterwards, to wit, on the 15th day of May, A. D. 1865, there was filed a motion to confirm sale and satisfy decree, in the words and figures following, to wit:

In the circuit court of the United States, district of Iowa.

MATILDA SYPHER, adm'x of the estate of S. Y. Keene, deceased, *v.* J. C. SAVERY *et al.* } Motion to confirm sale and satisfy decree.

Now comes the defendant, J. C. Savery, and moves the court to confirm the sale made herein of the property described in the decree by the master of this court, and declare the decree herein satisfied.

WITHROW & SMITH,
For the Def't Savery.

65 *Exceptions to report.*

And afterwards, to wit, on the 16th day of May, A. D. 1865, exceptions to report of master were filed, in the words and figures following, to wit:

In U. S. circuit court, dis't of Iowa.

MATILDA SYPHER, adm'x of S. Y. Keene, dec'd, pl'ff, *vs.* JAMES C. SAVERY *et al.*, def'ts.

Now comes the complainant and objects to the report of the master herein filed of the sale of the mortgaged property set forth in complainant's bill, and moves to set the same and the sale therein reported aside, because—

I. Thy complainant as adm'x had no authority to make such purchase.

II. The sale was made under a pretended contract or agreement that complainant had no power to make.

III. The said sale was procured to be made by fraud of the defendant, James C. Savery, and without the authority or consent of complainant.

IV. That it was made as claimed by respondents under a pretended contract that the said James C. Savery, one of the respondents, shows by his affidavits on file herein and the affidavits of his attorney to have been procured by fraud.

Complainant therefore asks that said report be not confirmed and that the sale therein reported to court be set aside.

POLK & HUBBELL, *Sol'rs for Comp't.*

publication thereof in a weekly newspaper printed in the city of Des Moines, and by posting written or printed notices thereof, one on the west front door of Sherman's block, one on the north door of the court-house, and one at the west front door of the capitol in Des Moines, Iowa, and by further serving notice of such sale on the def't, J. C. Savery, at least twenty days prior to such sale.

And it was further ordered that, from the proceeds of such sale, the master should pay, first, the costs of said sale; secondly, the costs of this suit; and thereafter the amount of the said decree and interest, or so much thereof as might be realized from the proceeds of such sale, and the excess, if any, to be paid to the clerk of this court to be held for the use of the said defendants.

I, W. G. Woodward, master in chancery appointed by this court, do respectfully certify and report that, having been charged by the solicitor of the complainant in writing with the execution of th
said decree, I advertised the said premises to be sold by me
59 at the west front door of Sherman's block, in the city of Des Moines, on the 3d day of October, A. D. 1863, by giving four weeks' notice of the time and place of such sale by publication thereof in the Iowa State Register, a weekly newspaper printed in the city of Des Moines, for four consecutive weeks before the day of sale, and by posting printed notices thereof, one at the west front door of Sherman's block in Des Moines city, one at the north door of the court-house, and one at the west front door of the capitol in Des Moines, and by further serving notice of the time and place of such sale on the def't, J. C. Savery, more than twenty days before the day of such sale, as will more fully appear by the proofs of such notices contained in the affidavits and acknowledgments hereto attached and made exhibits hereof.

And I hereby further report that on the said 3d day of October, 1863, I attended at the time and place of sale, and exposed the said lands to sale at public auction to the highest bidder, and the said land and lots were sold and struck off in separate parcels, as follows: lot six (6) in block twenty-three (23), in Keene and Poindexter's addition, to William M. Patchen, for the sum of one hundred and fifty dollars ($150), he being the highest and best bidder therefor; lot one (1) in block thirty (30), in the same addition, to William Halloran, for the sum of one hundred and fifty dollars ($150), he being the highest bidder therefor, and all the following lots were struck off to the complainant, viz:

Lot five (5) in block twenty-three (23); lot two (2) in block
60 thirty (30); lot five in block thirty (30); lot six in block thirty (30); fractional lot one (1) in block thirty-one; lot two in block thirty-one (31); lot five (5) in block thirty-one (31); lot six (6) in block thirty-one (31); lot seven (7) in block thirty-one (31); lot one (1) in block thirty-two (32); lot two (2) in block thirty-two (32); lot seven in block thirty-two (32); lot one in block thirty-three (33); lot two (2) in block thirty-three (33); lot six (6) in block thirty-three (33; lot seven (7) in block thirty-three (33); lot eight (8) in block thirty-three (33); and lot nine (9) in block thirty-three (33), all in Keene

and Poindexter's addition to the city of Des Moines; each of which was bid off by the complainant, by S. V. White, her soliciter, for the sum of one hundred and fifty dollars, amounting in all to the sum of two thousand and seven hundred dollars. And also the undivided half of forty acres of land lying adjoining the south side of the said lots, the other half of which is owned by the said Poindexter, and is designated on the map of Bausman & Co. as Keene and Poindexter's addition, was in like manner bid off by and struck off to the said complainant, by her said solicitor, for the sum of five thousand and seven hundred and eighty dollars and nine cents ($5,780 09), she being the highest and best bidder in each of said bids and sales. The said sales together amount in all to the sum of eight thousand and seven hundred and eighty dollars and nine cents ($8,780 09.)

And I have executed and delivered a deed to the said Wm.
61 M. Patchen, W. Halloran, and the deed to complainant was draughted and executed, saving the filling blank describing the character of the pl'ff as purchaser, whether as administrator or as trustee of the heirs of the estate.

And I further report that I have disposed of the proceeds of said sale in the manner following:

Retained for my comm'n	$46 76
For deed and per diem, report, and acknowledgment	8 25
For stamps for three deeds	11 00
Paid for printing notices	17 50
Paid to the clerk of the court costs of the suit, &c.	44 12
	127 63
Paid S. V. White, esq., complainant's solicitor, for the purchase of W. M. Patchen	$150 00
Purchase of W. Halloran	150 00
Paid to same for the purchase of lots and land by the said,	8,352 46
	8,652 46

Which is the amount of the debt and interest, and this decree and the costs therein are fully satisfied.

Which is respectfully submitted by

W. G. WOODWARD, *Master in Chancery.*

62 *Request to sell.*

In the circuit court of the United States, May term, 1863.

MATILDA SYPHER, admin'r of S. Y. Keene,
vs.
JAS. C. SAVERY.

To W. G. Woodward, master in chancery:

SIR: You are hereby requested to proceed to make sale of the

mortgaged premises in the abovenamed cause, in accordance with the decree therein, at as early a day as practicable, the said debt still remaining unpaid.

S. V. WHITE, *Solicitor for Comp't.*

Des Moines, August 20, 1863.

I, Stephen V. White, do make oath and say that on Sept. 4th, 1863, I posted a notice in print, of which the attached notice is a copy, at the west front door of Sherman's block, another at the west front door of the capitol, and another at the north front door of the court-house, all in Des Moines.

S. V. WHITE.

Subscribed and sworn to before me, by S. V. White, on Oct. 3d, 1863.

W. G. WOODWARD,
Clerk Circuit C't U. S., Iowa.

Master in chancery's sale.

Whereas on the 21st day of May, A. D. 1863, by the consideration of the circuit court of the United States for the district of Iowa, at a term of said court begun and holden in the city of Des Moines on the second Tuesday of May, A. D. 1863, in a certain cause then and there depending in said court wherein Matilda Sypher, late Matilda Keene, administratrix of the estate of Samuel Y. Keene, deceased, was plaintiff, and James C. Savery and others were defendants, it was, among other things, found that there was due the plaintiff from said James C. Savery the sum of eight thousand four hundred twenty $\frac{90}{100}$ dollars and interest at six per cent. from May 12th, 1863. together with costs of suit taxed at $; and whereas it was further ordered that within sixty days from that date the said James C. Savery should pay the said sum, and in default thereof the undersigned was appointed special master and commissioner in chancery to sell the real estate hereinafter mentioned and described, and was authorized, directed, and required, whenever requested by the plaintiff or his counsel, to sell said real estate in separate parcels, or so much thereof as is necessary to satisfy said sum. with interest, costs, and accruing costs, at the west front door of Sherman's block, in the city of Des Moines, first giving four weeks' notice of the time and place of said sale by publication in a weekly newspaper printed in the city of Des Moines, and by posting written or printed notices thereof, one on the west front door of Sherman's block, one at the north door of the court-house, and one at the west front door of the capitol; and whereas payment thereof hath not been made, and the undersigned hath been requested by plaintiff's counsel to sell said premises:

Now, therefore, notice is hereby given to all whom it doth or may concern that, on Saturday the third day of October, A. D. 1863, I will, at the west front door of Sherman's block, in the city of Des Moines, at the hour of eleven o'clock in the forenoon of said day, expose for sale the certain pieces or parcels of the land situate, lying, and being in the county of Polk and State of Iowa, viz:

Lots number five (5) and six (6) in block number twenty-three (23); lots number one (1), two (2), five (5), and six (6) in block thirty (30); fractional lots numbered one (1), two (2), five (5), six (6), and seven (7) in block number thirty-one (31); lots numbered one (1), two (2), and seven (7) in block number thirty-two (32); lots numbered one (1), two (2), six (6), seven (7), eight (8), and nine (9) in block thirty-three (33), all in Keene and Poindexter's addition to Des Moines, as the same is platted and recorded in the recorder's office of Polk county, Iowa; also the undivided half of forty acres lying adjoining the south side of said lots, the other half of which is owned by Poindexter, and is designated on the map of Bausman & Co. as Stevens and Poindexter's addition, or so much of said lots and lands as may be necessary to satisfy said sum, and will upon such sale execute a deed or deeds to the purchaser or purchasers according to the order in said case so made by the said court, at the time and place aforesaid, to which reference is hereby made.

WM. G. WOODWARD,
Special Master and Com'r in Chancery.

S. V. WHITE, *of Counsel for Plaintiff.*

Sept. 2—4w.

63 I, James C. Savery, do admit that due and legal service of this notice was made on me Sept. 4th, 1863.

J. C. SAVERY.

I, F. W. Palmer, printer and publisher of the Iowa State Register, a weekly newspaper printed and published at Des Moines, in Polk county, Iowa, do depose that a notice, of which the annexed is a copy, was published for four weeks consecutively preceding the 3d day of October, 1863, in the aforesaid newspaper.

F. W. PALMER.

Subscribed and sworn to, by F. W. Palmer, before me this 3d day of October, A. D. 1863.

W. G. WOODWARD,
Clerk of Circuit Court of the U. S. for Iowa.

Advertisement.—Master in chancery's sale.

Whereas on the 21st day of May, A. D. 1863, by the consideration of the circuit court of the United States for the district of Iowa, at a term of said court begun and holden in the city of Des Moines on the second Tuesday of May, A. D. 1863, in a certain cause then and there depending in said court wherein Matilda Sypher, late Matilda Keene, administratrix of the estate of Samuel Y. Keene, deceased, was plaintiff, and James C. Savery and others were defendants, it was, among other things, found that there was due the plaintiff from said James C. Savery the sum of eight thousand four hundred twenty $\frac{20}{100}$ dollars and interest at six per cent. from May 12th, 1863, together with costs of suit, taxed at $; and whereas it was further ordered that within sixty days from that date the said James C. Sav-

ery should pay the said sum, and in default thereof the undersigned was appointed special master and commissioner in chancery to sell the real estate hereinafter mentioned and described, and was authorized, directed, and required, whenever requested by the plaintiff or his counsel, to sell said real estate in separate parcels, or so much thereof as is necessary to satisfy said sum, with interest, costs, and accruing costs, at the west front door of Sherman's block in the city of Des Moines, first giving four weeks' notice of the time and place of said sale by publication in a weekly newspaper printed in the city of Des Moines, and by posting written or printed notices thereof, one on the west front door of Sherman's block, one at the north door of the court-house, and one at the west front door of the capitol; and whereas payment thereof hath not been made, and the undersigned hath been requested by plaintiff's counsel to sell said premises:

Now, therefore, notice is hereby given to all whom it doth or may concern, that on Saturday, the third day of October, A. D. 1863, I will, at the west front of Sherman's block, in the city of Des Moines, at the hour of eleven o'clock in the forenoon of said day, expose for sale the certain pieces or parcels of land situate, lying, and being in the county of Polk, and State of Iowa, viz: Lots number five (5) and six (6) in block number twenty-three (23); lots number one (1), two (2), five (5), and six (6) in block thirty (30); fractional lots numbered one (1), two (2), five (5), six (6), and seven (7) in block number thirty-one (31); lots numbered one (1), two (2), and seven (7) in block number thirty-two (32); lots numbered one (1), two (2), six (6), seven (7), eight (8), and nine (9) in block number thirty-three (33), all in Keene and Poindexter's addition to Des Moines, as the same is platted and recorded in the recorder's office of Polk county, Iowa; also the undivided half of forty acres lying adjoining the south side of said lots, the other half of which is owned by Poindexter, and is designated on the map of Bausman & Co. as Stevens and Poindexter's addition, or so much of said lots and lands as may be necessary to satisfy said sum, and will upon such sale execute a deed or deeds to the purchaser or purchasers according to the order in said case so made by the said court, at the time and place aforesaid, to which reference is hereby made.

WM. G. WOODWARD,
Special Master and Com'r in Chancery.

S. V. WHITE, *of Counsel for Plaintiff.*
Sep. 2—4w.

In circuit court of United States, May term, 1863.

MATILDA SYPHER, administrator, &c.,
vs.
JAS. C. SAVERY, *et al.*

The plaintiff in the above cause to F. W. Palmer, Dr.:

To four weeks' advertisement in the Iowa State Register of notice of sale in the abovenamed cause $17 50

Des Moines, Oct. 3d, 1863, received the above in full from S. V. White, esq.

F. W. PALMER.

64 *Notice to confirm sale.*

And afterwards, to wit, on the 15th day of May, A. D. 1865, there was filed a motion to confirm sale and satisfy decree, in the words and figures following, to wit:

In the circuit court of the United States, district of Iowa.

MATILDA SYPHER, adm'x of the estate of S. Y. Keene, deceased, *v.* J. C. SAVERY *et al.*	Motion to confirm sale and satisfy decree.

Now comes the defendant, J. C. Savery, and moves the court to confirm the sale made herein of the property described in the decree by the master of this court, and declare the decree herein satisfied.

WITHROW & SMITH,
For the Def't Savery.

65 *Exceptions to report.*

And afterwards, to wit, on the 16th day of May, A. D. 1865, exceptions to report of master were filed, in the words and figures following, to wit:

In U. S. circuit court, dis't of Iowa.

MATILDA SYPHER, adm'x of S. Y. Keene, dec'd, pl'ff,
vs.
JAMES C. SAVERY *et al.*, def'ts.

Now comes the complainant and objects to the report of the master herein filed of the sale of the mortgaged property set forth in complainant's bill, and moves to set the same and the sale therein reported aside, because—

I. Thy complainant as adm'x had no authority to make such purchase.

II. The sale was made under a pretended contract or agreement that complainant had no power to make.

III. The said sale was procured to be made by fraud of the defendant, James C. Savery, and without the authority or consent of complainant.

IV. That it was made as claimed by respondents under a pretended contract that the said James C. Savery, one of the respondents, shows by his affidavits on file herein and the affidavits of his attorney to have been procured by fraud.

Complainant therefore asks that said report be not confirmed and that the sale therein reported to court be set aside.

POLK & HUBBELL, *Sol'rs for Comp't.*

66 *Additional report.*

And on the same day, to wit, on the 16th day of May, A. D. 1865, there was filed an additional report of the master, in the words and figures following, to wit:

Circuit court of United States, district of Iowa, May term, A. D. 1865.

The undersigned, the master appointed to make the sale in the cause of Matilda J. Sypher, late Matilda J. Keene, *v.* James C. Savery *et al.*, would represent that the said sale, with two others, was assigned to and took place on the 3d day of October, A. D. 1863, which was a Saturday. The following Monday was the next rule day, when by the rule the report was to be filed. This want of time pressed upon the master inconveniently.

At the sale S. V. White, solicitor, appeared for the complainant. The two lots being bid off by Patchen and Halloran, said White bid off the remainder of the property for the rest of the debt and the cost, in behalf of the complainant, but said he was not prepared to say in whose particular name the deed should be made, and he desired me to hold that matter open and leave a blank for the name until he could ascertain the matter.

67 I cannot say that Mr. White stated to me at the time of the sale specifically the alternative of the name of the grantee, but afterward I understood it to be a question only whether the deed should be made to Mrs. Sypher as administrator, or to her for the heirs of the estate, or, it may be, to the heirs direct. But I did not have the idea, at any time, that it might be to her personally as on her individual purchase. It was for this reason alone, or to have this point settled, that no name of a grantee was inserted in the report as formerly filed. A deed was drawn and executed, leaving a similar blank, for the same reason. Deeds were delivered to the said Halloran and Patchen, but Mrs. Sypher did not request her deed, nor has she since that time.

The question of filling that blank with the name of the grantee remained unanswered for some time, and I believe Mr. White never directed me what name or names to insert until the winter of 1864–5, (at what particular date I cannot say, but about the first of January, on the evening before he left Des Moines,) when he directed me to complete the papers by inserting the name of the complainant, the administratrix of the estate. The reason I did not then perfect the papers forthwith was that I was then about to leave for home, and intending to do it on my return. From all I heard and knew I supposed the sale and proceedings to be in a great degree amica-

68 ble, and thought I could with propriety fill the blank in the report, although it was then filed.

W. G. WOODWARD, *Master.*

Motion to withdraw report and to refile.

And on the same day, to wit, on the 16th day of May, A. D. 1865, there was filed by the master a motion to withdraw, amend, and refile his report, in the words and figures following, to wit:

Circuit court U. S. for Iowa, May term, 1865.

M. J. SYPHER, late Kean, *v.* J. C. SAVERY. } No. 10, eq.

Now comes W. G. Woodward, the master authorized to make sale in the above cause, and moves the court for leave to withdraw his report heretofore filed in this cause and to amend or perfect the same and then to refile it.

W. G. WOODWARD, *Master.*

69 *Affidavit of Seely.*

And on the same day, to wit, on the 16th day of May, A. D. 1865, there was filed the affidavit of J. F. Seely, in the words and figures following, to wit:

In U. S. circuit court, district of Iowa.

MATILDA KEENE, adm'x of the estate of S. Y. Keene, dec'd, *vs.* JAMES G. SAVERY *et al.*

I, J. F. Seely, do state on oath that, during the year 1863, I was in the office of S. V. White, attorney at law, in Des Moines, Iowa, in the capacity of clerk. That during said year, the exact date I cannot now give, I drew up or copied from a paper handed to me by def't, Savery, a stipulation between the plaintiff and the defendant James C. Savery in this cause, and at the instance and request of said Savery, I took the same around to complainant to get her to sign it. She examined the same and peremptorily refused to sign it, stating at the time that it was not the contract between her and said Savery, or words to that effect, I think. I informed both S. V. White and the defendant, James C. Savery, that I had presented said stipulation to complainants, and she had refused to sign it because it was not the contract. I further state that I recognize Exhibit No. (2) attached to complainant's affidavits herein filed, as the stipulation I took to her, and which she refused to sign, as I have above stated. The said exhibit is in my handwriting.

J. F. SEELY.

Subscribed and sworn to, by J. F. Seely, before me this 16th day of May, 1865.

[SEAL.]

F. M. HUBBELL,
Notary Public, Polk county, Iowa.

70 *Affidavit of Elvira Price.*

And on the same day, to wit, on the 16th day of May, A. D. 1865, there was filed the affidavit of Elvira Price, in the words and figures following, to wit:

In U. S. circuit court, district of Iowa.

MATILDA KEENE, adm'x of the estate of S. Y. Keene, dec'd, *vs.* JAMES C. SAVERY *et al.*, def'ts.

I, Elvira Price, do state on oath, that I am the sister of the complainant, and have been residing with her in Des Moines, Polk county, Iowa, since about the day of February, A. D. 1863; that some time during the spring or summer of 1863, Mr. S. V. White, who was then acting as attorney for my sister in this case, came to her house, and in my presence presented to her a paper purporting to be a contract between her and James C. Savery, the defendant, in regard to the sale of the property mentioned in this suit; that she examined the same and immediately informed him that it was not the contract, and she would not sign it; that both she and Mr. White became somewhat excited and angry at the time, which impresses the matter more distinctly upon my recollection; that during such conversation she told Mr. White that the property was sold for taxes, or incumbranced by taxes, and Mr. Jas. C. Savery must pay them off as he agreed to do. I further state that J. F. Seely, a clerk of Mr. S. V. White, a short time after the visit of Mr. White above set out, came to the house of complainant wtih another paper relating to the settlement of the matters in controversy in this suit, and told complainant
71 that he had been sent round by Mr. White to get her to sign it; she took the paper, examined it, and refused to sign it, saying that it was not the contract, and telling Mr. Seely that she would not sign any such contract, and he need not send to her any more that purpose.

ELVIRA PRICE.

Subscribed and sworn to before me this 15th day of May, A. D. 1865, by Elvira Price.

[SEAL.] F. M. HUBBELL, *Notary Public.*

Motion to continue.

And afterwards, to wit, on the 18th day of May, A. D. 1865, there was filed a motion to continue, in the words and figures following, to wit:

Circuit court of the United States, district of Iowa.

MATILDA SYPHER, adm'r, *vs.* JAMES C. SAVERY *et al.* } Motion to continue.

Now comes the defendant, James C. Savery, and moves the court to continue the hearing of this motion to confirm the sale herein filed, for reasons appearing in the affidavits on file.

WITHROW & SMITH, *for Savery.*

72 *Affidavit of Savery.*

And on the same day, to wit, on the 18th day of May, A. D. 1865, there was filed the affidavit of the defendant, J. C. Savery, in the words and figures following, to wit:

Circuit court of the United States, district of Iowa.

MATILDA K. SYPHER, administratrix of S. Y. Keene,
vs.
JAMES C. SAVERY and OTHERS. } Affidavit.

STATE OF IOWA, *Polk county, ss:*

James C. Savery, being first duly sworn, deposes and says that the mortgage sued upon in the above-mentioned cause, was given to secure a part of the purchase-money of the land described in said mortgage, which this affiant purchased of Samuel Y. Keene, deceased; that the said Matilda Sypher (then Matilda Keene) brought suit to foreclose the mortgage, and for judgment on the notes for the balance of the purchase-money then due, as administratrix of the said S. Y. Keene; that prior to the bringing of said suit this affiant had paid to said S. Y. Keene the sum of about thirty-five hundred ($3,500) dollars in part payment of said purchase-money; that prior to the bringing of this suit the said affiant has sold lots to one Patchen, and lots to one Holleran; that about the time of bringing this suit, and afterwards, this affiant had several interviews with the said Matilda for the purpose of compromising the suit, and avoiding litigation and costs; that this affiant proposed at one of said inter-
73 views that he would give up the money already paid on the premises, pay plaintiff's attorney's fees, and the costs in the case, and pay all the taxes on the land, and that the said plaintiff should release all claim against said lots sold as aforesaid to Patchen and Holleran, and take the remainder of the mortgaged premises in full satisfaction of the balance of the purchase-money due; that to this proposition the plaintiff replied that she would accept it, if instead of paying the taxes as above stated, this affiant would pay her three hundred dollars in money, the said plaintiff at the same time remarking that she preferred to look after the taxes and pay them herself, or words to that effect; that while the suit was still pending this affiant and the said plaintiff entered into an arrangement and agreement as follows, to wit: that this affiant should pay the said plaintiff three hundred dollars in cash, pay the plaintiff's attorney's fees, and pay the costs of the suit and sale; that a decree should be taken, and the premises sold; that Holleran and Patchen should bid in the lots bought by them for the gross amount of $300, which should go as a credit on the decree and judgment; that the said plaintiff was to bid in the balance of the mortgaged premises for the balance of the amount due on the decree and judgment, and that thereupon satisfaction of the judgment and decree should be entered of record. Said affiant,

further deposing, on his oath says that he paid the said three
74 hundred dollars to the said plaintiff's attorney for her use and benefit, and she accepted the same as agreed; that he paid her attorney's fees as agreed; that he paid the costs of the suit as agreed to the plaintiff's attorney; that he never entered into any contract with the said Matilda, or any one, for her to pay the taxes; that the only proposition that was ever made that this affiant should pay the taxes was made by this affiant, and was at the same time promptly and expressly rejected by the said Matilda, and she proposed instead thereof to take $300 and pay the taxes herself, which was accepted by this affiant, and the contract of settlement entered into between said plaintiff and this affiant was the same as above stated, without addition or subtraction. That affiant has fulfilled every act and thing agreed to be done by him, and he is prejudiced in that the decree and judgment in this cause remains unsatisfied of record through the failure of the said plaintiff to accept the commissioner's deed to said premises, and her refusal to allow said judgment and decree to be satisfied as she agreed to do; that the premises have been sold; that the lots sold to Patchen and Holleran were bid in as agreed, and deeds have been executed and delivered accordingly; that plaintiff's attorney bid in the balance of said premises for plaintiff as agreed upon, but that said plaintiff now refuses to accept the deed to the same, or to satisfy the judgment against this defendant. Said affiant
75 further states that for a long time, and until recently, he had believed and acted upon the belief that the said Matilda had carried out her part of the contract, and that the judgment and decree were satisfied of record.

J. C. SAVERY.

Subscribed and sworn to before me, by James C. Savery, this 13th day May, 1865.

[SEAL.] SEWARD SMITH,
Notary Public, Polk County, Iowa.

[Stamp.]

Affidavit of Savery for continuance.

And afterwards, to wit, on the 20th day of May, A. D. 1865, there was filed an application for continuance, in the words and figures following, to wit:

Circuit court of the United States, district of Iowa.

MATILDA SYPHER, adm., *vs.* JAMES C. SAVERY *et al.* } Affidavit to continue motion.

James C. Savery, being duly sworn, deposes and says: that he is informed by his counsel, and verily believes, that he cannot submit the motion herein filed to confirm the sale made by the master herein without the affidavit of S. V. White, esq.; that this affiant is informed, and verily believes, that he can prove by the said White the truth of

all the statements made by the said White in his letter to this
76 affiant, which is hereto appended; that he can also prove by
said White that the conversations set out by the complainant, E. Price, and J. F. Seely, in their several affidavits herein filed, all occurred after the sale by the master, and after this affiant had performed all the stipulations of the contract and settlement on his part; that at no time prior to said sale did the complainant assert claim or pretend that it was stipulated in said contract that this affiant should pay the taxes in arrear on said property; that the complainant did not refuse to sign a written memorandum of the terms of said settlement on the ground that it should show that the taxes in arrear were to be paid by the affiant; that the said White was at the time the solicitor of said complainant in this suit; that he did not advise her to make any settlement with the affiant; that said contract was made by and between the parties directly, and that in the whole matter, from the time of such settlement until after the sale, the said White was governed by the instructions of said complainant; that he ordered the sale and purchased the property for the complainant, in compliance with her instructions given to him as her solicitor. And this affiant shows further that the said S. V. White is now a resident of the State of New York, and is now, as affiant is informed and believes,
at his home in the city of New York; that affiant was not
77 advised until since the commencement of this term of this
court that any opposition would be interposed to a confirmation of said sale, and that he did not know that the affidavit of said White would be needed on the hearing of the motion to confirm until after he read the affidavits of the complainant, E. Price, and J. F. Seely, and that he has not had a sufficient time in which to procure the same, but that he believes that he can and will have the same in time to submit this motion at the next term of this court.

J. C. SAVERY.

Subscribed and sworn to before me, by J. C. Savery, this 20th day of May, 1865. Witness my official signature and seal.

[SEAL.] SEWARD SMITH,
Notary Public, Polk Co., Iowa.

Letter of White.

Letter referred to in the foregoing affidavit, and annexed and filed therewith:

J. C. Savery:

In answer to your request for a statement of the condition of the judgment in Matilda Sypher, adm. of the estate of S. Y. Keene, against you in circuit court of the United States for district of Iowa,
I would say that the cause was in my hands for collection, and in
78 process of litigation. That prior to any final judgment in the
case I was informed by you that you and plaintiff had settled the cause, and at your request I made a memorandum of the terms of settlement, and carred it in to the plaintiff, who said it was right.

The terms were that you were to pay $300 cash to plaintiff, which was paid; that you were to pay me my fee of $120, which you paid, and were to pay all costs of suit and sale, which you also paid. The land in the mortgage was to pay the entire debt. The $300 paid was to be for the two lots sold to Halloran and Patchen, who were to bid the same in at that price, and the execution was to receive a credit for the same by the $300 then paid. The other lots were to be bid in for the full amount of balance of debt. I showed the memorandum to pl'ff; she said it was right, and under her direction I collected the $300, and paid it to her, taking her receipt. At next term I took decree for the amount of claim, and proceeded to bid in property as directed, and took deeds as named, and the decree is thereby satisfied, but plaintiff has never accepted the deed from the master in chancery.

Yours, S. V. WHITE.

N. Y., Ap'l 6th, '65.

79 And afterwards, to wit, on the 19th of October, A. D. 1865, there was filed the affidavit of S. V. White, in the words and figures following, to wit:

Affidavit of White.

Circuit court of U. S. for distr. of Iowa, Oct. term, 1865.

MATILDA SYPHER, adm. of S. Y. Keene, deceased,
vs.
JAMES C. SAVERY *et al.*

I, Stephen V. White, do state on oath that during the pendency of the above-entitled cause I was sole solicitor and counsel for complainant. That during the pendency thereof and before final decree was had therein I was informed by defendant, James C. Savery, that he had settled the cause with complainant on the basis of paying her three hundred dollars in cash, and having her bid in the property for amount of the debt, the said Savery to pay all court costs, costs of sale, and my own fee, the three hundred dollars to be in lieu of the two lots of defendants, Halloran and Patchen, who were to have the privilege of buying the same in under the master's sale for a sum in the aggregate amounting to three hundred dollars, without any further actual payment therefor than the three hundred dollars, and he said to me that plaintiff wished to see me and have me draw up papers showing the settlement. This was the first intimation
80 that I had, and the first knowledge I had that any settlement was talked of or thought of by the parties. That previous to that time plaintiff had frequently told me that Savery was proposing different schemes of settlement, and on consultation with me as to what she had better do, I had uniformly told her that, while it was no part of my business as attorney to advise her as to a settlement, yet my judgment was against any settlement other than by payment.

I had always told her that I had confidence that Savery's ultimate resources were such that it could be collected, although he was generally considered then to be insolvent and much involved financially. I further state that I did call on plaintiff immediately afterwards, and was by her informed that such settlement had been made, and directed to draw the papers, and to be sure to have them specify that unless Savery paid all costs, and my costs, the settlement should not be binding. That I went to my office and drew the stipulation as directed; collected the money of Savory; called again on plaintiff, and read to her carefully the stipulation once or twice, and upon her statement to me that it was right, I paid her the three hundred dollars, taking her receipt therefor, which original receipt in my receipt book I mark "A" and exhibit to the court to aid
81 them in determining the facts herein. That the stipulation by me then drawn up is the paper made Exhibit No. 1 to plaintiff's affidavit, except that the words "being 2 lots as follows: lot No. 1, block thirty, and lot six in block twenty-three, Keene and Poindexter's addition," on the second page, interlined, were not then written and were never written by me, but were written without my knowledge, as I believe, by James C. Savery, months afterwards. Dropping out that interlineation the court will have the paper, as prepared by me as a memorandum for my future action, and which was read, discussed, and assented to, as correct, by plaintiff at that time.

In pursuance of that agreement, at the next term of court, Hon. C. C. Cole, of counsel for defendants, withdrew further defence, and the decree was taken as shown by the records of this court. That I had no further interview with plaintiff until just before the sale, when I called on plaintiff and inquired whether I should bid the property off in the name of plaintiff as administratrix, or in the name of the minor heirs of said Samuel Y. Keene, telling her that I saw that it had been sold for taxes, and if taken in the name of the minor heirs they could have till the youngest came of age in which to redeem; and if subsequent taxes were paid, the interest would
82 be ten per cent. till paid, which might be of advantage. I said also to her, that, as the children were the real beneficiaries, probably the same rights would inure if held by her as administrator.

She said that she would talk with Mr. Sypher about it, and let me know. We talked about the tax sale, and she censured Savery for having had the property bought at tax sale to make costs, and I suggested to her that I would look at the legal question and see whether at law Mr. Savery was not bound as under an implied contract to pay taxes accruing on land while he held the fee, and expressed by readiness, if I satisfied myself that such was the law, to attempt their collection. Not one word was said by her that there was an express agreement on the part of Savery to pay them to my remembrance, and I could not have forgotten it under my relations to the case, and the remarks I made as to that question of law, as I verily believe.

A short time after that, and I think on the morning of the sale,

having a master's sale occurring on the same day against R. W. Sypher, pl'ff's husband, I spoke to him first about the sale of the land against him, and then inquired if his wife decided yet as to whose name I should bid in the land in the Savery case. He said to me, she was talking of taking it in her name, and selling
83 enough to pay the taxes up, but she would let me know definitely soon. Not having been advised further, on the morning of the sale I bought in the property, bidding in the name of the plaintiff, and so announcing to the master and bystanders, but told him that if pl'ff preferred to have the deed run to the children, the cestuis que trust, rather than to herself as administratrix, the names might be so inserted, as it was an amicable sale. Up to that time I had no intimation that there was any possibility of trouble in the settlement, the sole ground of complaint, on part of pl'ff, being a surmise by her that Savery was at fault—that the property had been sold for taxes. At the time the sale came off Savery was out of the city, but before he left he authorized F. C. D. McKay to pay the costs, as per the agreement. On the day of the sale, and before I bid off the property, I called on said McKay, and he paid me $100 on account of my own fee, and $100 to pay the costs of court. I paid the costs in full, and supposed the deed would show the purchase to be by complainant, and that the deed would run to her unless the names of the heirs were furnished, and was only reminded that there was a blank in his report by Judge Woodward as I was about to leave for New York, when I told him to fill the blank with complainant's name, ac-
84 cording to my bid at the time. I state further, that after the sale had been made some considerable time, I was asked by the little son of plaintiff to call and see his mother; that she wished to see me on business. That I did so. That, in that interview, she first wanted to know what was in the paper which she had signed. I told her that, as I remembered it, she had signed no paper. She was confident she did, and said it was about the three hundred dollars. I then remembered the receipt, and told her of it. She wished to see it, and see what was written there. I produced it, and then proceeded to business. She said, in substance, that I never ought to have settled the case till those taxes were paid. I reminded her that I had never settled the case at all. She said that she had told me over and over again she would never settle with Savery unless he paid the taxes all up. I told her she had said over and over again she would never settle unless he paid the debt all up; that I remembered her oft-repeated declarations of that kind, but had no remembrance of her mentioning the taxes. That the time to speak of that was when she dictated to me the terms of her settlement, which I looked on as cancelling all other directions to me in the premises. She said she never would stand by the settlement at all; that it was not right, and that I must have known it was not as she meant it to be. After considerable discussion of some warmth, she told me just
85 what she thought. That Savery had more money than she had, and that I had favored him the most. Upon my telling her I could only consult my self-respect by leaving her house, she

averred that she did not mean to insult me, that she just supposed it was the way lawyers did.

I only know by hearsay that a few days later defendant Savery called at my office, and in my absence made the interlineation spoken of before in the stipulation, and had John F. Seely make a copy of it and take it to plaintiff to sign.

I believe I have affirmativly stated the facts as fully as I now can recall them; but as complainant's affidavit herein mentions other matters, that the court may not spend time in attempting to harmonize inconsistencies, I state further:

1. That I never at any time came to plaintiff and informed her that defendants were willing to arrange the matter in any way. I never received from defendant, or communicated to plaintiff, any proposition of settlement.

2. I never stated to plaintiff that she had or had not the authority, as administratrix, to make the settlement; until I saw the question indirectly raised in plaintiff's affidavit, I never thought of it, much less gave advice upon it.

3. It is not true that after the three hundred dollars were paid, and before the sale, I presented the paper marked Exhibit No.
86 1, or any other paper, to plaintiff and requested her to sign it. I never asked her to sign any paper in connexion with the case so far as I know, except the receipt. I state positively that the stipulation and receipt were written by me at my office at the same time; that the two were taken by me to the plaintiff's house, and the stipulations read over and agreed to first, then the money paid, and the receipt signed and taken. By examination I find that, being early in May, I made the same mistake in each in writing April and then changing it to May 2d. That as to asking pl'ff to sign the agreement, I no more thought of doing so than I should of asking her to sign a motion or other paper in the case. That my experience in the practice was then so limited that it never occurred me that I should ever be accused of disregarding a client's interest, and I took no precautions to guard against such accusation, and that, at the time of the sale, I had no suspicion that the plaintiff was dissatisfied with the terms of the settlement, or that the sale was any other than an amicable one.

4. It is not true that I ever sent J. F. Seely or any other person to ask pl'ff to sign the paper named, and if he said I did, then he contradicted both the facts and his own affidavit herein filed.

5. It is not true that the interview wherein complainant and myself became somewhat angry and excited occurred either in the spring or summer of 1863. It was after the sale in October,
87 and I think from one to two months after it.

5. In conclusion, I state that (as I believe the court will remember) I prosecuted this case with vigor, and almost with bitterness at times, against defendant, and I state that being his attorney on other cases I, early in the progress of this suit, notified him that I could not even talk with him about his rights, and would not; that it was pecuniarily against my interest to have it settled, because I al-

ways believed I could make the money, and my fees in that case would have been much more than they were on the amicable settlement. That if I have been tediously minute, it is because plaintiff has, in support of her motion, made an attack upon me as an officer of this court, and as a member of a profession in which it will ever be my greatest pride to believe I acted my humble part without forgetting its dignity and the obligations I had assumed on entering it; and I have sought to bring to light even minute facts, knowing that truth was consistent in all its parts.

S. V. WHITE.

STATE OF IOWA, *County of Polk, ss:*

Sworn to and subscribed before me this 17th day of October, A. D. 1865.

[SEAL.] A. E. CHESTER, *Notary Public, Iowa.*

Final order.

88 And afterward, on the 20th day of October, A. D. 1865, it still being of the October term of the said circuit court, the following further proceedings were had in the said cause, viz:

Motion to confirm sale.

MATILDA SYPHER, adm'x on the estate of S. Y. Keene, deceased, *v.* JAMES C. SAVERY *et als.* } No. 10, eq.

This cause coming on for hearing, on the motion of the defendant to confirm the report of the master of the sale of the mortgaged property and on the exceptions of the plaintiff thereto, both parties being present in court by their solicitors, and the court having inspected the evidence offered on the hearing of said motion and all things appertaining thereto, it is ordered, adjudged, and decreed that the report of the master herein be not confirmed, but that the sale herein as reported by the master be set aside except as to
89 the lots sold to the said Patchen and Halloran, which sale to said Patchen and Halloran is confirmed.

And it is further ordered that the decree in this cause be credited with the sum of four hundred dollars, the amount paid by the defendant Savery to the plaintiff and her attorney on the 3d day of October, A. D. 1863, and that the master of this court proceed to make sale of said mortgage property under the original decree herein rendered, to pay the balance found due on said mortgage, and that the defendant, James Savery, pay the costs of this motion, taxed at $.

And it is further found that the defendant Savery has paid all the costs in this cause up to the filing of the report of the master herein, and it is therefore ordered that such costs be not again taxed to him and collected herein.

And it is ordered that the penal amount of the appeal bond in this cause, in case an appeal be taken, be in the sum of eight thousand dollars.

90 *Order on appeal.*

And afterward, on the 21st day of the same October, the following further proceedings were had:

MATILDA J. SYPHER, adm'x, &c., *v.* JAMES C. SAVERY *et al.* } No. 10, eq.—Order allowing appeal.

And on this day came the defendant James C. Savery, by his solicitors Withrow & Smith, and prayed an appeal to the next term of the Supreme Court of the United States, to be held at Washington on the first Monday of December next, from the order and decree herein rendered, setting aside the sale herein made by the master of this court, and ordering a resale of the property under the decree hereinbefore rendered, and to him it is granted upon condition that the defendant enter into good and sufficient bond, with good and sufficient surety, in the penal sum of ten thousand dollars, conditioned that he prosecute his appeal with effect, and answer all damages and costs if he fail to make his plea good. And it is ordered that
90*a* such bond, when taken and filed in this cause, shall operate as a supersedeas to the order and decree of this court aforementioned.

Order approving bond.

And now on this same day comes the defendant in open court and tenders an appeal bond in the above-entitled cause, with George W. Savery and B. F. Allen as sureties, in the penal sum of ten thousand dollars; and the court having inspected the said bond, and being satisfied that it is in conformity to law and the order of the court herein, and that the sureties are good and sufficient, it is now ordered that the said bond be approved and filed. And it is further ordered and entered that the bond of appeal taken and filed in this cause operate as a supersedeas to the decree of this court.

91 *Appeal bond.*

And on the said 21st day of October, A. D. 1865, was filed the following bond on appeal:

MATILDA J. SYPHER, admin'x of estate of Sam'l Y. Keene, deceased, *v.* JAMES C. SAVERY *et al.*

Know all men by these presents, that we, James C. Savery, George W. Savery, and B. F. Allen, are held and firmly bound into the above-named Matilda J. Sypher, administratrix of the estate of Samuel Y. Keene, deceased, in the sum of ten thousand dollars, to be paid to

the said Matilda J. Keene, her executor or administrator, to which payment well and truly to be made we bind ourselves and each of us, jointly and severally, and our and each of our heirs and executors, firmly by these presents. Sealed with our seals and dated November 1st, 1865.

Whereas the abovenamed James C. Savery hath appealed to the Supreme Court of United States from the order and decree of the circuit court of the United States for the district of Iowa in
92 the above-entitled suit—

Now, therefore, the condition of this obligation is such that if the abovenamed James C. Savery shall prosecute his said appeal to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

JAMES C. SAVERY,
By WITHROW & SMITH, *Atty's in fact.*
G. W. SAVERY.
B. F. ALLEN.

Which bond is indorsed: "Approved by the court, and filed Oct. 21st, 1865.

"W. G. WOODWARD, *Clerk.*"

93 UNITED STATES OF AMERICA, *District of Iowa:*

I, W. G. Woodward, clerk of the circuit court of the United States in and for the district of Iowa, hereby certify that the foregoing ninety-seven pages and part pages of writing constitute a full, true, and complete transcript of all the pleadings, papers, and record entries in the aforesaid cause of Sypher, admin'x, *v.* Savery *et al.*, as fully as they remain of record in my office.

In testimony whereof, I hereunto set my hand and affix the seal of the said circuit court, at Des Moines, this 4th day of December, A. D. 1865.

W. G. WOODWARD,
Clerk of Circuit Court U. S., Iowa.

Fees: Transcript	$24	30
Certif. and seal		35
	24	65

93 pages in all, pp. 49*a* and 90*a*, 22*a*, *b*, *c*, and *d*, not being counted in the 91.

Received the above of Messrs. Withrow & Smith, Des Moines, Dec. 5, 1865.

94 Copy of original draft of final decree, attached at the request of complainant's solicitor.

MATILDA SYPHER, late Matilda Keene, admin'x of estate of late J. Y. Keene, dec'd,
v.
J. C. SAVERY *et al.*

This case being now called for hearing, the complainant appears by S. V. White, his solicitor, and the defendants by C. C. Cole, their solicitor, agree in open court that on the 12th day of May, 1863, there is due from the defendant, J. C. Savery, to the complainant, Matilda Sypher, late Matilda Keene, administratrix of the estate of S. Y. Keene, on the notes and mortgage sued on, the sum of eight thousand four hundred and twenty and $\frac{90}{100}$ dollars ($8,420 90.)

Whereupon it is ordered, adjudged, and decreed by the court that the complainant, Matilda Sypher, late Matilda Keene, adm'r and c., the sum of four thousand four hundred and twenty and $\frac{90}{100}$ dollars, with interest thereon from May 12th, 1863, at the rate of 6 per cent. per annum, and the costs of this suit taxed at $.

And it is further ordered, adjudged, and decreed that the
95 said defendant, J. C. Savery, pay to the complainant or S. V. White, her solicitor, within sixty days from the above date, the abovenamed sum, with interest and costs, and in default of such payment that J. F. Seely, especial commissioner and master of this court, whenever requested thereto in writing by the complainant or her said solicitor, be authorized, directed, and required to sell and dispose of the real estate mortgaged, that is to say: lots numbers five and six (5 and 6) in block twenty-three (23), lots number one, two, five, and six (1, 2, 5, and 6) in block thirty (30), fractional lots one, two, five, six, and seven (1, 2, 5, 6, 7) in block (31), lots one, two, and seven (1, 2, and 7) in block (32), and lots one, two, six, seven, eight, and nine (1, 2, 6, 7, 8, and 9) in block thirty-three, situated in Keene and Poindexter's addition to Des Moines. Also the undivided one-half of forty acres lying adjoining south side of said lots, the other half of which is owned by Poindexter, designated on the map of Bauseman as Keene and Poindexter's addition. Which real estate is hereby ordered
96 to be sold to satisfy this decree, principal, interest, and costs, which said sale is hereby ordered to be made by the said commissioner in the city of Des Moines, where this court is held. And the said commissioner is hereby directed and required to give four weeks' notice of the time and place of such sale by publication of notice thereof in a weekly newspaper printed in the city of Des Moines, and by posting written or printed notices thereof, one at the west front door of said Sherman's block, one at the north door of the courthouse, and one at the west front door of the capitol, in Des Moines, Iowa, and shall further serve notice of such sale on the defendant, J. C. Savery, at least twenty days prior to such sale. And further it is ordered that the complainant or any of the parties to this suit may become the purchaser at such sale.

And the said commissioner shall, upon such sale, pay, first, the costs

of such sale; second, the costs of this suit; and thereafter the amount of the said decree and interest, or so much thereof as may be realized from the proceeds of said sale; and the excess, if any, shall be
97 paid to the clerk of this court, to be held for the use of the said defendant.

And it is further ordered, adjudged, and decreed that the said commissioner shall, on the next rule day after the day of such sale, file with the clerk of this court a report of the said sale and all his doings in the premises, and shall deliver to the defendant, J. C. Savery, or his counsel, a copy thereof at the same time, and the said defendant shall be held to file his exceptions thereto on or before the next rule day thereafter, if any exceptions he have.

And it is further ordered, adjudged, and decreed that, from and after such sale, the equity of redemption of the defendants, J. C. Savery, Annie Savery, William Halloran, and William M. Patchen, and of all persons whomsoever claiming or to claim the said land by, through, or under them, since the date of said mortgage, to wit, since the 24th day of August, A. D. 1857, be and the same is hereby forever barred and foreclosed.

And it is further ordered, adjudged, and decreed that the purchaser or purchasers of such mortgaged premises be let into possession
98 thereof, and that any of the parties in this cause who may be in possession of said premises, or any part thereof, or any person who, since the commencement of this suit, has come into possession by or under them, or either of them, deliver possession thereof to such purchaser or purchasers, on production of the master's deed for said premises, and a certified copy of the order confirming the report of such sale after such sale has become absolute.

SAM. F. MILLER, *Judge.*

Circuit court of U. S., Iowa.

UNITED STATES OF AMERICA, *District of Iowa:*

I hereby certify that the foregoing five pages of writing are a full, true, and complete copy of the original draught of decree in the aforesaid cause of Sypher, adm'x, *v.* Savery *et al.*, as the same now remain on file among the papers of the cause in my office. And, in
99 explanation of the fact that the name of W. G. Woodward is entered in the decree instead of that of J. F. Seely, as master or commissioner to make the sale, I further certify that I had then recently been appointed a master in chancery in the said circuit court, and also a commissioner of the United States, (which S. V. White, esq., seemed not to know, or else to have forgotten, when he drew the draft for the decree, he being the solicitor for the complainant,) and J. F. Seely had then recently been appointed by me to be my deputy as clerk of the said circuit court. Said Seely had been a clerk in said White's office studying law, and afterwards, being admitted to the bar, occupied the same office with said White until he came into my office as my deputy. Under these circumstances it was, at the said White's direction or with his consent and approbation, that my name

was substituted in the decree for that of J. F. Seely, and I certify that said Seely conducted the entire proceeding down to the
100 day of sale, but I made the sale myself in person.

In testimony whereof, I hereto set my hand and affix the seal of the said circuit court, at Des Moines, this 5th day of December, A. D. 1865.

W. G. WOODWARD.
Clerk of Circuit Court of U. S. for Iowa.

Filed December 13, 1865.

IN THE

Supreme Court of the United States.

No. 339. — December Term, 1867.

JAMES C. SAVERY, *Appellant*,

vs.

MATILDA J. SYPHER, Administratrix of Samuel Y. Keene, Deceased, *Appellee*.

STATEMENT.

The appellant, James C. Savery, and his wife Anna, executed a mortgage on certain real estate in Des Moines, Iowa, to one Samuel Y. Keene, now deceased, to secure certain promissory notes therein described. After the death of Samuel Y. Keene, his widow, Matilda J. Keene, now Matilda J. Sypher, qualified as his administratrix and instituted this suit in the Circuit Court of the United States in and for the District of Iowa, against said Savery and wife *et al*, to foreclose said mortgage.

The defendants having failed to enter their appearance in said cause and answer, a default was granted and an order entered taking complainant's bill for confessed. At the next term of the court, respondents moved to set aside the default, and in support of such motion filed the

affidavits of J. C. Savery, C. C. Cole, F. C. D. McKay, Wm. M. Patchen, and William Halloran, accompanied by the answers of respondent, Patchen and Halloran, and the joint answer of Savery and wife. (See *Trans.* pages 9 to 21 inclusive.)

This motion was resisted by the affidavit of S. V. White, complainant's counsel. The court, on the hearing, sustained the same, and ordered the default set aside and permitted respondents to appear and defend.

The complainant, Matilda J. Keene, before this cause was reached for trial on the docket, married one Reuben W. Sypher, and the cause was continued to final hearing in the name of Matilda J. Sypher, Administratrix of Samuel Y. Keene, deceased.

The default was set aside at the December Term, 1862, and answers of respondents filed and the issues made up, and when the cause was called for trial at the May term, 1863, no steps had been taken by respondents to prepare for trial. No evidence had been taken by respondents, and the time therefor had expired. The respondents, having no defense (as the record will show), and no evidence, made a virtue of necessity, and by their counsel, C. C. Cole, agree in open court to a decree for the foreclosure of the mortgage and sale of the mortgaged property to pay the amount due thereon. (See Trans. p. 23).

On the 3d day of October, 1863, the Master proceeded to execute this decree by the sale of the mortgaged property. The respondents, Patchen and Halloran, at such sale bid in the property claimed by them, and S. V. White, complainant's counsel, bid off the balance of said property, but for whom, the report of the Master did not show, nor is it now definitely known. (See Trans. p. 36 for amended

report of Master.) Complainant on the 13th day of May, 1865, moved the court to set aside the Master's report because the same was in blank, and for the further reason that said sale and purchase was made in violation of an understanding with complainant, and in fraud of her rights. After this motion was filed, the Master, by leave of court, withdrew the original report and amended the same by showing that the property was sold to complainants, and re-filed it on the 15th day of May, 1865, and on the same day the respondents moved the court to confirm the same. (Trans. p. 35.) On the day following, complainant filed her exceptions to the amended report, and moved to set the same aside, as well as the sale therein reported, for the following reasons, to-wit:

I. Complainant as administratrix had no authority to make the purchase.

II. The sale was made under a pretended contract or agreement that complainant had no power to make.

III. The said sale was procured to be made by fraud of the respondent, J. C. Savery, without the authority or consent of complainant.

IV. That it was made as claimed by respondent under a pretended contract that the said J. C. Savery, one of the respondents, shows by his affidavits on file herein, and that of his counsel, to have been procured by fraud.

The motion to confirm this report, and the exceptions of complainants thereto, were submitted to the Court on the evidence offered by the respective parties, and the Court, after considering the same, ordered that such sale

be set aside. (See Trans. p. 46.) From this order respondents, J. C. Savery and wife, appeal. The respondents, Patchen and Hallorom, having obtained the relief they desired in the Court below, do not appeal.

ARGUMENT.

I. The record does not show what evidence was introduced on the hearing of the motion and exceptions to the Master's report. There is nothing in the order of the Court referring to or in any way identifying the evidence. (Trans. p. 46.) The clerk in his certificate to the record shows simply "*That the foregoing ninety-seven pages and part pages of writing constitute a full, true, and complete transcript of all the pleadings, papers, and record-entries in said cause.*" It contains not one word showing that all or any part of the evidence has been sent up with the transcript. The truth is that all the evidence has not been sent up. This is apparent from the record. One of the points made by complainant is, that J. C. Savery had permitted the mortgaged property to become incumbered with taxes, &c., and the certificate of the Treasurer of Polk County, Iowa, is referred to for the purpose of showing such incumbrance. (See motion to set aside sale. Trans. p. 25, and affidavit of complainant, J. C. Savery, in regard to taxes.) This certificate was used in evidence, and it nowhere appears in the transcript. Other evidence and admissions in regard to the value of mortgaged property were considered by the Court on the hearing of this motion, none of which appear in the record.

This court will not presume error in the action of the

court below, nor review its decisions, without all the evidence being duly certified up.

Conn. *v.* Penn. 5 Wheat. 424.

The ship Potomac, 2 Black. 581. See 584.

II. If this court should hold that all the evidence offered in this cause in the court below has been certified up, then we maintain that the court below did not err in setting aside the sale made by the Master herein, because,

1st. Complainant in her representative capacity had no power to make such purchase. She as administratrix can not convert the assets of the estate into realty unless it is absolutely necessary to save the debt to the estate. In this case no such necessity existed, as respondent is solvent.

Hill on Trustees' side, page 377, 2 Am. Ed.

Eckford *v.* De Kay, 8 Paige, 88; see 94.

2d. The sale was made under a pretended contract with respondent that complainant had no power to make. The mortgaged premises were worth greatly less than the amount due on the mortgage. (*See Aff. of complainant as to value of land, which is not disputed by respondents.*) The agreement then to take this land in full of the mortgage debt, is a compromise of the rights of the estate that complainant could not make without an order of the county court.

Revision (Iowa) of 1860. See 2368.

2 Williams on Executors, side p. 1532, and on; (4th Am. Ed.)

De Dienier *et ux v.* Van Wagner, 7 Johnson, 403.

3d. The sale was procured to be made by the fraud of respondent, J. C. Savery, and without the knowledge, authority or consent of complainant.

From the time this suit was instituted, it is manifest that respondent, Savery, by fair means or foul, intended to force the complainant to take the mortgaged premises in satisfaction of the debt secured thereby, notwithstanding they were worth greatly less than such debt. When the default was entered against him and it became necessary to set it aside, he (Savery) swears "that I have fully stated my defense to a counsellor of this court retained by me, and am informed by him and do verily believe I have a good and sufficient defense." (Trans. folio 18.) His counsel swears "that I have no personal knowledge of the facts connected with the defense, but am conversant with the matters of defense as stated to me by my client, the said J. C. Savery, that the substance of the defence, so far as said James C. Savery and wife are concerned, is that the conveyance of the real estate embraced in the mortgage was made by the said Samuel Y. Keene and wife to said Savery without any consideration being paid therefor, and the notes and mortgage sued on were also executed without any consideration, and the entire transaction was had at the instance and urgent request of said Keene for the purpose of fraudulently keeping said real estate from the creditors of the firm of Newton & Keene, of which firm said Keene was a member; that said firm was in failing circumstances at the time, and actually made an assignment for the benefit of creditors about that date; that the purpose of taking negotiable notes and mortgage was in order to transfer them to a brother of said Keene, *who would take the property in payment of said notes and*

mortgage. (See affidavit C. C. Cole, Transcript, pp. 10 and 11.)

The court will observe how carefully these affidavits are worded. Mr. Savery, who alone could know what his defense was, does not set it out in his affidavit. He tells his counsel what it is, and he (the counsel) very kindly undertakes to swear to it. This division of labor is fully accounted for in the fact that such pretended defense was both false and fraudulent, as is discovered in the affidavit of Savery, filed herein to sustain the Master's sale. Forgetful, perhaps, of the means resorted to for the purpose of setting aside a default properly entered against him, (and thereby gaining time) when it becomes necessary to show some equities in support of the Master's report, he swears "that the mortgage sued upon in the above mentioned cause was given to secure a part of the purchase money of the land described in said mortgage, which this affiant purchased of Samuel Y. Keene, deceased; that the said Matilda Sypher (then Matilda Keene) brought suit to foreclose the mortgage for the balance of the purchase money then due; that prior to the bringing of said suit this affiant had paid to S. Y. Keene thirty-five hundred dollars, in part payment of said purchase money."

How widely variant these two statements of respondent are as to the mortgage and notes. In the one he and his counsel swear that the notes and mortgage are without consideration, that he took the title to the mortgaged land and gave his notes the better to enable Samuel Y. Keene to swindle his creditors. In the other he swears he did buy the land of S. Y. Keene, that the notes and mortgage were given for a valid consideration, and that he had paid thirty-five hundred dollars on the purchase.

This defense set up by respondent (and which he now swears was false and fraudulent), was the beginning of that fraud which resulted in the sale complained of. It was a solemn representation to complainant (who was the widow of Samuel Y. Keene, deceased, and who it is fair to presume knew nothing of the arrangement between her late husband and said Savery,) for the purpose of inducing her to enter into the pretended contract, under which respondent (Savery) claims the Master's sale was made.

Complainant never assented to any such arrangement for the purchase of the mortgaged property, but, on the contrary, always repudiated it. She swears that Mr. White, her solicitor, (who, as appears from the record, had a general retainer from Mr. Savery, also,) presented a stipulation, embodying the arrangement as contended for by Mr. Savery, to her for her signature, and she peremptorily refused to sign it; that afterward Mr. Selby, a clerk of Mr. S. V. White's, presented a similar stipulation to her for her to sign, and she again refused to consent to it. (Trans. p. 26.)

Miss Elvira Price swears that she was present when Mr. White presented this stipulation to her sister, the complainant, and she refused to sign or approve it. (Trans. p. 38.)

Mr. Selby (Mr. White's clerk) corroborates the evidence both of Mrs. Sypher and Miss Price. He swears that he presented the stipulation above mentioned to complainant, and she peremptorily refused to sign it, stating at the time it was not the contract between her and Savery, and that he informed both S. V. White and James C. Savery that she refused to sign it because it was not the contract. (Trans. p. 37.)

This evidence is not contradicted by any one except Mr. White, whose affidavit does not satisfactorily explain how it was that Mrs. Sypher had this stipulation (one drawn by himself) in her possession, if he never presented the same to her for her signature. He had no power as an attorney to make such a contract with Savery. He knew this, and must have presented the stipulation to her for her ratification, which she refused to do.

It is clear from the evidence that both Mr. White and respondent Savery tried to procure complainant's consent to purchase the land at the Master's sale for the full amount due on the mortgage, and that she at all times peremptorily refused to do so, and that both White and Savery had knowledge of this refusal before such sale was made, and yet in violation of her rights and wishes as often expressed, Mr. White bid off said property for the amount of the decree, and the respondent Savery is attempting to confirm such sale.

It is true that complainant was induced by the fraudulent representations of Savery (and by the failure of her own counsel to advise her that she had no right to make such arrangement) to consent to bid off the mortgaged property for the full amount of the decree, but it was on the express condition that J. C. Savery would pay all taxes on the land and return the same to her free of incumbrances. That such was the agreement and the only agreement in regard to this sale, we refer to complainants' affidavits. This stipulation she was willing to carry out, so far as she had the power, but respondent refused to pay or provide for such taxes and remove the incumbrances from such property, and for this reason complainant refused to bid the mortgaged property in.

We maintain therefore that such property was worth greatly less than the amount due on the mortgage; that it was largely incumbered by taxes and had actually been sold for taxes; that it was bid in at the Master's sale for the full amount of the decree, without complainant's knowledge, authority or consent, and that respondent Savery procured such bid to be made, in violation of her express directions both to her attorney and to himself, and that therefore the sale is fraudulent and should have been set aside.

4. If, however, complainant entered into such an arrangement, equity and good conscience requires that it be not executed. If she should thus convert the assets of the estate, she and her sureties would be liable therefor. No court of equity should therefore compel complainant to execute such a contract and thereby force her to perpetrate a wrong both to the estate she represents and to her sureties — or in other words, commit a devastavit. In this case the contract set up by respondents was not executed, nor would respondent Savery in the least be injured by the refusal of complainant to execute the same. His indebtedness to the estate is not increased thereby, nor is he deprived of one cent paid by him under the pretended arrangement. A credit is given him on the decree for the last farthing paid.

III. It may be contended that such agreement was made before the decree was entered up, and that respondent abandoned their defense on account of such arrangement.

In answer to this we say:

1. That their answer sets up no defense, and they could not have successfully resisted complainant's claim.

When the cause was called for trial, respondent's had taken no evidence whatever to sustain their defense, and the time under the rule for taking proof had expired.

2. The matters set up in his answer were wholly without foundation, as he (Savery) admits under oath. (See Savery's affidavit, Trans. p. 39.)

3. Such pretended agreement was not gotten up until after the decree was obtained.

There is nothing in the decree to indicate that it was made on any such stipulation, but, on the contrary, it contradicts the same. It (the decree) recites, "That the cause being called for hearing, it was agreed in open court that respondent Savery is indebted to complainant in the sum of $8420.90." It provides "that J. C. Savery shall pay to complainant, or to the clerk of this court, within sixty days from the date of decree, the aforenamed sum, with interest and costs of suit; and in default thereof that the Master proceed to sell, etc., and that either party may purchase at such sale, and that the proceeds of such sale be applied first to the payment of the costs, and then to the extinguishment of the amount found due complainant, and the excess, if any, is required to be brought into court for the benefit of respondent Savery, etc." (Trans. p. 23.)

Again, the affidavits of complainant, Miss Price, and J. F. Seely we think clearly shows that this pretended contract was made, if at all, after the decree was rendered. Their evidence as to the time it was made is supported by that of S. V. White, who shows that the stipulation presented to complainant by J. F. Seely was drawn by J. C. Savery months after the decree. (See Trans. p. 43, folio 81.) If the one Mr. White says he

drew was prepared and signed before the decree, why was Mr. Savery and Mr. White's clerk preparing and presenting another stipulation of the same character months after? J. F. Seely swears that he notified both White and Savery of complainant's refusal to sign such stipulation.

The failure of Savery to take any evidence in support of his defense, the fact that such defense was unfounded, the language of the decree and the evidence offered on the hearing, all show that this arrangement, if made at all, was made after the decree, and furnished no inducement whatever thereto.

For the reasons above stated we ask an affirmance of the order setting aside the sale of the Master, and ordering a re-sale of the property.

~~POLK & HUBBELL,~~
Of Counsel for Appellees.

Charles Mason

Supreme Court of the United States.

JAMES C. SAVERY
vs.
MATILDA SYPHER, *Adm'x.*

No. 77.

On a bill to foreclose a mortgage, the Circuit Court for the District of Iowa, by consent of parties on May 21, 1863, decreed that there was due to complainant, $8,420 90, and that the mortgaged property should be sold by the master, and a report thereof be made by him, "at the next rule day after said sale." Fol. 24.

The sale was made on October 3, 1863, but no report was made until May 16, 1865. In this report it is stated that the property in question had been bid off at the sale by S. V. White for the complainant, but that no deed was made, as it was not understood in whose name it was to be filled up, and that White never communicated this information until the winter of 1864–'5. Fol. 36.

On the filing of this report, Savery, the defendant below, moved for its confirmation, and Mrs. Sypher, the complainant, resisted it by filing her objections thereto. Fol. 35.

This motion was heard on affidavits to be found in the record (26, 27, 28, 37, 38, 39, 42,) and on consideration thereof on October 20, 1865, the court ordered that the sale be set aside with direction to the master to proceed to make sale of the property under the original decree. Fol. 46.

It is from this order or decree that this appeal is taken by Savery, one of the defendants below.

1st. The appellate power of this court whether on appeal or writ of error is confined to the examination of "*final judgments and decrees*," and does not include the order of resale made in this case.

Until a confirmation the title to the thing sold is not changed, and no obligation imposed upon the purchaser.

2 Daniels, Chan. 1453, 1461, 1465.

Whether a resale was proper was a question addressed to the sound discretion of the court, and the exercise of that discretion is not reviewable in this court.

A writ of error does not lie to a refusal to quash a *venditioni exponas* issued after an injunction granted, "all motions of this sort to quash executions are addressed to the sound discretion of the court." The refusal to quash is not in the sense of the common law, a judgment, much less a final judgment, and by the provisions of the judiciary act a writ of error lies only in cases of final judgments."

Boyle *vs.* Zacharie, 6 Pet., 657.

The same doctrine applies to a judgment of restitution in an action of ejectment. This is not a final judgment in a civil action, nor a decree in a court of equity. It is no more than the action of the court on its own process, which is submitted to its own discretion."

Smith *vs.* Trabue, 9. Pet., 7.

So after an appeal which did not operate a supersedeas, a supplemental decree was passed ordering a sale of the property, it was held "that the supplemental decree of sale is but a decree in execution of the original decree; and not a final decree in contemplation of the act of Congress."

Carr *vs.* Hoxie, 13 Pet., 462.

So a refusal to open a decree and re-hear a cause is not the subject of an appeal, as it is a matter within the discretion of the court.

Wylie *vs.* Cox, 14 How., 2.

So on an appeal from an order of attachment, the court say: "This involves no new question or decision, but was the ordinary means of enforcing the original decree. In no sense was it a final decree on which an appeal can be sustained."

In Meckin *vs.* Perin, 20 How., 134.

So on appeal from an award of the writ of *habeas facias possessionem* it was held, that the order of the court direct-

ing process to issue, is not such a final order or decree as the act of 1789 contemplates."

Callan *vs.* May, 2 Black, 543.

In opposition to these doctrines are the two cases of—

Blossom *vs.* Milwaukie, 1 Wallace, 657.

Railroad *vs.* Souter, 5 Wallace, 662.

An examination of the former case shows that the question was not decided but, in fact, reserved. The language of the court is: "It is said that the act of the court in refusing to confirm or complete the sale was entirely within its jurisdiction and therefore cannot be reviewed here. The case of Delaplaine *vs.* Lawrence, 10 Paige, 602, *seems* to imply a different doctrine. However this may appear on investigation, we think its decision involves the merits of the case before us, and requires such an examination of the whole record as can only be made on a full hearing."

The case of Railroad, in 5 Wallace, refers its decision to the case of Blossom above cited.

No authority is cited in favor of the position that an appeal would lie in such a case, but the case from 10 Paige, an examination of which shows that the decision turned upon the construction of a statute of N. York, as to which it is said: "The statute allowing appeals to the court from the orders, decrees and sentences of surrogates is very general in its terms. It declares that appeals may be *made in all cases*, except when provision is made for appeal to circuit judges;" and the court concludes "*therefore* an order vacating a sale is appealable."

The act of Congress, unlike the New York statute does not give the appeal in all cases, but limits it to *final decrees.*

2d. The agreement relied on to compel the complainant to become the purchaser of the estate, resting in parol, is void under the statute of Frauds in force in Iowa, and could not be enforced specifically in a direct proceeding for that purpose.

2 Story's Eq., §71.

But if it were a valid agreement, inasmuch as it was entered into prior to the decree, it could not be used to control it on a mere motion sustained by affidavit.

3d. Mrs. Syphen, as administratrix, had no authority to enter into such an agreement, much less had she authority to purchase in the name of the heirs of her deceased husband.

4. White, the attorney, had no authority, *virtute officii*, to purchase the property in the name of his client.

Beardsly *vs.* Root, 11 John. Rep., 467.

ON THE FACTS.

Mrs. Sypher positively asserts that the agreement which was proposed, expressly provided that the property was to be returned to her in the same condition as when it was deeded to Savery, that is, free from all titles, tax titles, or other liens, and she offers still to complete the arrangement if the court should be of opinion that, as administratrix, she had the power to do so. If she has not the power, she offers to return the $300 paid to her for the lots sold by Savery to Patchem and Haloran. 26, 27.

She further states that *before the sale*, her attorney presented to her a written agreement, and subsequently Mr. Seely presented her with another the date of which is May 2, 1863, that she positively refused to sign these agreements, as they did not provide for a payment of the taxes. That she had directed her attorney not to have the property sold as set out in those agreements, and that his sale and purchase of the property was in violation of her real agreement and against her instructions to him. These papers, thus presented to her are filed with her affidavit, as Exhibits 1 and 2, p. 28.

As the whole controversy turns upon the question of the taxes, it will be seen that the statement of Mrs. Sypher, in this particular, is supported by—

Mrs. Elvira Price who swears she was present at an interview between Mrs. Sypher and Mr. White in the spring or summer of 1863. That White wished her to sign an agreement as to the sale of the property. That she examined it and immediately refused to sign the contract. That both parties "became somewhat angry and excited." That she told White "the property was sold for taxes, or encumbered by

taxes and Savery must pay them off as he agreed to do." This witness further states that a short time thereafter, Mr. Seely, the clerk of White, called with another paper, referring to the same matter, which she refused to sign for the same reasons urged to White. P. 38.

The evidence of Mr. Seely confirms this statement and adds "I informed Mr. White and Mr. Savery, that I had presented the said stipulation to the complainant and she had refused to sign it because it was not the contract. He further states that the Exhibit 2 is the paper presented to her and is in his handwriting. P. 37.

That the payment of the taxes was fully in the contemplation of the complainant is seen by Savery's own affidavit.

In opposition to these three affidavits we have the affidavits of the defendant, Savery, and of White. It is admitted that they conflict on material points. In number of witnesses the case is in favor of the decree; and there is nothing to enable this court to pass either upon the intelligence or veracity of the several parties, so as to authorize a reversal. The witnesses were all known to the judge below, and the presumption is in favor of the decree. As to Savery, his position is not a very strong one. White, his own witness, states that his allegations on a motion to set aside the decree, *pro con. fesso*, are "utterly false." Pp. 12, 13.

Both upon the law and the fact the decree must be affirmed.

P. PHILLIPS,
for Appellee.

JANUARY 28, 1868.

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P. PHILLIPS,
for Appellee.

JANUARY 28, 1868.

United States Supreme Court.

December Term, 1867. No. 77.

SAVERY, APPELLANT,

VERSUS

SYPHER, APPELLEE.

Appeal from the Circuit Court of the U. S. for the District of Iowa.

BRIEF FOR APPELLANT.

J. HUBLEY ASHTON,
OF COUNSEL.

McGill & Witherow, Printers, Washington, D. C.

Supreme Court of the United States.

No. 77.

DECEMBER TERM, 1867.

JAMES C. SAVERY, APPELLANT,

vs.

MATILDA J. SYPHER, ADMINISTRATRIX OF SAMUEL Y. KEENE, DECEASED, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

STATEMENT OF FACTS AND POINTS FOR APPELLANT.

This is an appeal from a decree of the circuit court of the United States for the district of Iowa, setting aside a sale of certain mortgaged property in the city of Des Moines, made under a decree of foreclosure, and ordering a re-sale of the property under that decree. (Rec., p. 47.)

The appellant is the mortgagor, and one of the defendants in the bill for foreclosure. The appellee is the administratrix of the mortgagee, and complainant in that bill. She was also the purchaser at the sale in question.

The material facts of the case are these:

On January 29, 1862, Mrs. Keene, (now Sypher,) widow and administratrix of Samuel Y. Keene, filed a bill in the circuit court for Iowa, for the foreclosure of a mortgage on certain real estate in Des Moines, given by James C. Savery to Keene, on August 24, 1857, to secure the payment of an alleged debt arising upon two notes made by Savery in favor of

Keene, on June 11, 1856, and August 19, 1857, and for a sale of the mortgaged premises in satisfaction of the debt. (Rec., p. 1.) The defendants in the bill were the mortgagor, Savery, and two other parties, Halloran and Patchen, alleged purchasers of portions of the mortgaged property, subsequent to and with notice of the mortgage.

Each of the defendants answered; but as no questions arise upon the answers, their contents are unimportant.

In May 21, 1863, a decree in favor of complainant was entered in the cause, in pursuance of an agreement between the parties, previously perfected, for the compromise and settlement of the claim made in the bill, by which the defendant, Savery, was to pay the costs of the suit, and the complainant was to purchase, on behalf of her late husband's estate, all the land except the lots of Halloran and Patchen, at a sale under the decree, and those lots were to be bought in by their respective owners for $300, payable by Savery, and the decree thus satisfied. (Rec., p. 23.)

The decree, in the ordinary form, directed a sale of the premises by W. G. Woodward, a master of the court, in default of payment by Savery, within sixty days, of the amount adjudged due the complainant, $8,420 90, with interest from May 12, 1863.

[It may be proper to here remark that, appended to the transcript is a copy of the original draft of the decree, signed by the circuit judge. (Rec., p. 49.) The decree, as entered and recorded in the cause, differs from this draft in two particulars. In the original draft, J. F. Seely is the master authorized to make the sale, and in the decree entered of record, W. G. Woodward is mentioned as such master. In the former, the amount adjudged to the complainant is $4,420 90; in the the latter, that amount is $8,420 90. The certificate of the clerk of the circuit court, on page 50 of the printed Record, explains the change in respect to the master's name. The second alteration of the original draft, as embodied in the decree entered of record, was an obvious correction of an error, through inadvertence of the solicitor who framed the draft, in

respect to the proper amount for which payment should be entered under the agreement of the parties. The amount recited (*vide* p. 49) as admitted to be due was $8,420 90, and it was, of course, the intention of the parties that complainant should have a decree for the payment of that amount.]

A sale was had on October 3, 1863. The two lots of Halloran and Patchen were bought in by them for $300, previously paid by Savery. The remaining lots subject to the mortgage were bought by complainant, through her solicitor, Mr. White, for the sum of $8,480 09. (Rec., p. 31.) The aggregate of the bids just equalled the amount of the decree, with interest and costs of suit.

Of course, as the purchase by Mrs. Sypher was on behalf of the estate she represented, pursuant to the terms of the agreement mentioned, no money was actually paid, or intended to be paid, by her on account of the purchase.

Halloran and Patchen took their deeds. (Rec., p. 31.) A deed for the lots bought by complainant was executed by the master, but not at once perfected, as her solicitor was doubtful whether it should be made to her, as administratrix, or directly to the heirs, and promised to ascertain her wishes on this point. (Rec., p. 36.)

It soon became apparent, however, that Mrs. Sypher intended, if possible, to abandon or avoid her purchase, and thus repudiate her agreement with Mr. Savery. The deed was not applied for, nor was it till the winter of 1864–5 (the sale having been made October 3, 1863) that her solicitor gave the necessary instructions to the master, when he directed him to make the deed run to Mrs. Sypher as administratrix. (Rec., p. 36.)

Finding the purpose of that lady to be as stated, Mr. Savery at last, on May 13, 1865, applied to the court for an order confirming the master's sale and declaring the decree satisfied. (Rec., p. 25.)

This motion disclosed the designs of the appellee, for, on the same day she filed a counter-motion to set aside the sale, (Rec., p. 25,) which was renewed two days afterwards in the form of exceptions to the master's report. (Rec., p. 35.)

It is unnecessary to refer particularly to the multifarious objections urged by her to this sale nearly two years afterwards. Only one of them is attempted to be supported by proof of any sort. The single objection to which her affidavits were directed proceeded on an alleged non-performance by Mr. Savery of an asserted agreement made with her, as she would appear to state, before the decree, to pay off the taxes due on the land. She fully admitted that she had agreed to buy the land at the sale for an amount sufficient to satisfy the decree, but resisted the confirmation of that sale on the sole ground that Savery had promised that she should get an unencumbered title, and that, by reason of his failure to remove the lien of certain taxes, she could not obtain such a title by the purchase as she had stipulated for.

The evidence on her part consisted solely of her own *ex parte* affidavit, (Rec., p. 26,) that of her sister, (Rec., p. 38,) and that of Mr. Seely, her solicitor's clerk. (Rec., p. 37.)

Opposed to this testimony (if it can be dignified by that name) is the affidavit of Mr. Savery, (Rec., p. 39,) and the clear, full, and most explicit affidavit of Mr. White, her solicitor, (Rec., p. 42,) which refutes at every point the complainant's case as fabricated by the *ex parte* affidavits referred to.

The decree setting aside the sale was made by the district judge holding the circuit court. The learned justice of this court for the Iowa circuit was not present at the hearing.

FIRST POINT.

There never was any such agreement on part of the appellant as the appellee suggests, in avoidance of her purchase; and the court below was not justified, upon the affidavits before it, in finding that the appellant had ever promised to pay the taxes due on the land.

It is perfectly clear that this objection to the purchase was an afterthought, conceived months subsequently to the sale, and brought forward with an evil intent to deprive the appel-

lant of the benefit of it, and without the slightest color of truth, or warrant of probability, under the facts of the case. She had got the costs of the suit and three hundred dollars from Mr. Savery, paid before the sale, even before the decree, in scrupulous conformity with his agreement. More she was determined to get if she could, and the method devised to secure it was this motion to set aside the sale. The affidavit of Mr. White is a perfectly clear and consistent statement of the actual transaction. (Rec., pp. 43–46.) He says that the parties made their own agreement for the settlement of the suit, without his intervention; that the appellee directed him to draw a memorandum of its terms, which he did; that he collected from Savery the $300 agreed to be paid by him; that he took the written memorandum to the appellee, and read it *carefully to her once or twice;* that she approved it fully, and receipted to him for the $300; that Exhibit No. 1, attached to complainant's affidavit, (Rec. p. 28,) is a copy of the paper or memorandum approved by her; that the decree was, at the next term, entered by consent of appellant's counsel; that before the sale he consulted his client as to the purchase, and "*not one word was said by her that there was any express agreement on part of Savery to pay the taxes;*" that on the day of the sale he conversed with her husband, R. W. Sypher, in relation to the form of the deed for the property; that a "*considerable time*" after the sale the complainant sent for him, and declared her purpose that "*she would not stand by the settlement at all;*" that he never asked the appellee to sign the draft of the agreement, but that *months after the sale,* Mr. Savery had a copy of the document prepared by his (Mr. White's) clerk, and interlined a few words, descriptive of the lots purchased by Halloran and Patchen, and sent the same by the clerk (Seely) to the complainant to sign; and that the statement of Seely, (Rec., p. 37,) that he (White) sent him (Seely) with the draft of the agreement for the signature of complainant, which she refused, is utterly false.

It is perfectly clear that the document which Seely took to complainant, as mentioned in his affidavit, (Rec., p. 37,) was the interlined draft of the agreement sent by Mr. Savery, as

Mr. White states, (Rec., p. 43,) months after the sale, as the words mentioned by Mr. White as interlined by Mr. Savery at that time, appear only in Exhibit No. 2, attached to complainant's affidavit, (Rec., p. 29,) which Exhibit, Seely states, is the paper sent by Mr. Savery to complainant for her signature. (Rec., p. 37.) At the time this paper was sent by Mr. Savery to complainant, she had made up her mind, as Mr. White states, "*not to stand by the sale at all;*" and hence her refusal to sign the draft referred to.

If Mr. White is to be believed, (and there is nothing on the other side to contradict him,) there was no such agreement as pretended by complainant. The appellant's affidavit is explicit to the same point. (Rec., pp. 39, 40.) Mr. Savery says, "that he never entered into any contract with the said Matilda, or any one for her, to pay the taxes; that the only proposition that was ever made that this affiant should pay the taxes was made by this affiant, *and was at the same time promptly and expressly rejected by her, and she proposed instead thereof to take* $300 *and pay the taxes herself*, which was accepted by this affiant."

The only affidavit on behalf of appellee, except her own, is that of her sister, Elvira Price. (Rec., p. 38.) It is contradicted explicitly by Mr. White, and as the testimony of a woman not subjected to cross-examination, and a near relative of the complainant, is not entitled to much credit.

SECOND POINT.

But the court below clearly erred in attempting to determine the issue, raised by the motions, upon these *ex parte* affidavits.

1. The question of facts, as to the existence of the agreement set up by the appellee, should have been determined only after a full opportunity had been given to the appellant to cross-examine her witnesses before an examiner or master in chancery, and to contradict them by counter evidence. In other words, on these motions, the cause should have progressed, so

far as the taking and consideration of the proof were concerned, precisely as if the question as to the existence of the alleged agreement had been set up by the appellee on a bill by the appellant, to compel a specific performance of a contract to take the land.

No other form, or method of investigation, was adequate to the real purpose in view—the ascertainment by the court of the fact alleged by the appellee, in avoidance of her purchase. The precise issue was made by these motions, whether or not the appellant had ever promised to pay the taxes due upon the land, in consideration of the purchase of it by the appellee for the amount of the decree at the master's sale. If such a question had arisen in a suit for specific performance, the court would not for an instant have entertained the idea of deciding it upon *ex parte* affidavits. The case would have been referred to an examiner or master, who would have taken the testimony, according to the course of equity practice, and upon the completion of the testimony, the case, on bill, answer, and proof, would have been brought regularly before the court for decision. With what propriety, then, did the court here, on these motions, involving the identical question which might have arisen in a substantive proceeding, and that question alone, permit the wretched *ex parte* affidavits of this complainant, and her sister, and the clerk, Seely, to be introduced as testimony against the appellant on so important a question, and thus take away the right which the law guarantied to him of seeing these witnesses face to face, and cross-examining them upon the statements in these affidavits? The injury inflicted on the appellant by this method of investigation was extreme. It would be monstrous if a decree thus arrived at should stand.

2. It may be safely affirmed that no good case, here or in England, can be found in which a court of equity has ever undertaken to determine the question of the validity of the title of land, sold under its decree, on the application of the purchaser, without a previous reference of the title to a master, and a report thereon from such officer.

Mr. Dainell says:

"If the purchaser at a master's sale is responsible, the court will, if required, make an order that he shall, within a given time, pay the money into court, and be let into possession. Upon hearing the motion for the order, the court will, if the purchaser appears and has not precluded his right to object to the title, direct a reference to the master to inquire whether a good title can be made." (2 Chancery Pleading and Practice, 1513.)

In relation to suits for specific performance, (and the motion to confirm this sale was substantially of this character,) the same author says: "It may be mentioned, that there are some cases in which it is a rule of the court not to make any decree whatever till certain preliminary inquiries have been made by one of the masters of the court. This rule is invariably acted upon in suits for the specific performance of contracts, *and the court will not permit the question, whether a good title can be made or not, to be argued before it, in the first instance, even though the objection to the title are stated, and the questions arising upon them are properly raised by the pleadings.*" (*Ibid*, p. 1237.)

In cases where a master's sale is impeached on grounds affecting its regularity or fairness, no doubt courts of equity often act in a summary manner upon the affidavits of parties, and give speedily the relief necessary under the circumstances. This case is not, however, of that class. The objection was not to the form, method, time, or circumstances of the sale, but it asserted a peculiar and independent equity, based on an alleged agreement on the part of the defendant, that an unencumbered title should be conveyed to the complainant by the master's deed. It would be most extraordinary if any court could lawfully adjudicate the rights of parties to such a controversy, without either party having an opportunity to see or examine the witnesses of the other.

THIRD POINT.

The court below should have confirmed the sale, and left the appellee to bring an action upon the alleged contract of the appellant in regard to the unpaid taxes.

1. If there was any such agreement, it was clearly, on the appellee's own showing, an *independent* one, and not a *condition precedent* to the agreement of the appellee to purchase the land at the sale; and therefore this purchase must be enforced, and the appellee left to her *remedy* on the appellant's supposed contract in relation to the taxes.

2 Hilliard on Vendors, 40.

2 Williams's Saunders, 320, n. 4.

The appellee does not allege that any particular time was fixed by the agreement alleged for the discharge of the taxes; and she expressly, in her affidavit, declared her willingness to accept the deed, and carry out her contract, if the appellant would at *that* time (*two years after the sale*) discharge the taxes. (Record, p. 27.) If the appellant, by the agreement alleged, was bound to pay the taxes before the sale, and the appellee had stipulated for the purchase of the property only on condition that he did so before the sale, why, it may be asked, did she not expressly instruct her solicitor *not* to bid in the property *until* the appellant had removed the taxes? It is not proved, nor is it even alleged, that any such instruction was given to her counsel. Under these circumstances it is legally presumable that she authorized her solicitor to purchase.

On a question whether counsel had authority to perform an act for his client, the principle is, that if the weight of evidence is that a party did not dissent, a court will conclude that counsel had authority. (Elworthy *vs.* Bird, 1 Tamlyn's, C. R., 38.)

2. A court of equity will not permit its sale to be trifled with, as this appellant trifled with the sale under consideration. She was not constrained to make the purchase. She was a perfectly free agent in regard to it. She was at liberty to do just as she pleased. She appeared by her counsel at the sale, and bid the property up to the amount of the decree, evidently relying upon her ability to make the appellant keep his bargain, if he had made any, as to the taxes; and when she finds, two

years afterwards, that she is unable to compel him to pay the taxes, she invokes the aid of the court by a motion to set the sale aside.

3. There was or was not such an agreement as she asserts in regard to the taxes. If there was, and it was to be performed by appellant before the sale, and she had taken the proper steps to prevent her solicitor purchasing without and before the payment of the taxes, it was her duty, as soon as advised of the purchase, to ask that the sale be set aside. But she permitted two years to elapse before she disavows the action of her counsel. Independently of the effect of this silence and acquiescence in the purchase, as evidence of a *ratification* of the purchase, we affirm that it constitutes *laches* on her part, in respect to her duty to the *court*, which must operate as a bar to her application to set the sale aside.

4. Moreover, this delay may affect most seriously and injuriously the interests of the appellant. The property may have depreciated in value during the time which had elapsed since the sale. The outstanding tax title may have matured and become perfected during that period. Thus the property may bring little or nothing at the next sale. These and similar contingencies rendered it the duty of the complainant to take immediate action as to the sale; and in view of the possible, nay, probable, injury to the appellant, from a re-sale by the appellee, the court below should have held that she was *estopped* from impeaching it after two years of acquiescence.

FOURTH POINT.

The court below erred in ordering a re-sale of the property, without requiring that the purchaser at the tax-sale be made a party to the bill for foreclosure.

1. This party had clearly such an interest in the equity of redemption as entitled him to be joined in a proceeding to foreclose it.

Story's Equity Pleading, sec. 193.
Adams' Equity, 315.
Veach *vs.* Schaup, 3 Iowa, 199.

2. If the proceedings for sale of the property had been regular, and the time for redemption had expired, the sale divested the mortgage on which the suit was brought, and no valid decree for the sale of the property could be made by the court.

Parker *vs.* Baxter, 2 Gray, 185.
Niswanger *vs.* Gwynne, 20 Ohio, 556.
Dunlap *vs.* Gallatin, 15 Ill., 7.

FIFTH POINT.

If it should be contended that the complainant, as administratrix, had no authority, without the approbation of the county court, to compromise or settle the claim in suit, we answer that the Supreme Court of Iowa has expressly decided that contracts, *bona fide* made, in relation to personal property or choses in action of decedents, with executors or administrators, are valid.

Taylor *vs.* Frink, 2 Iowa, 87.

SIXTH POINT.

The decree of the circuit court should be reversed.

J. HUBLEY ASHTON,
For Appellant.

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